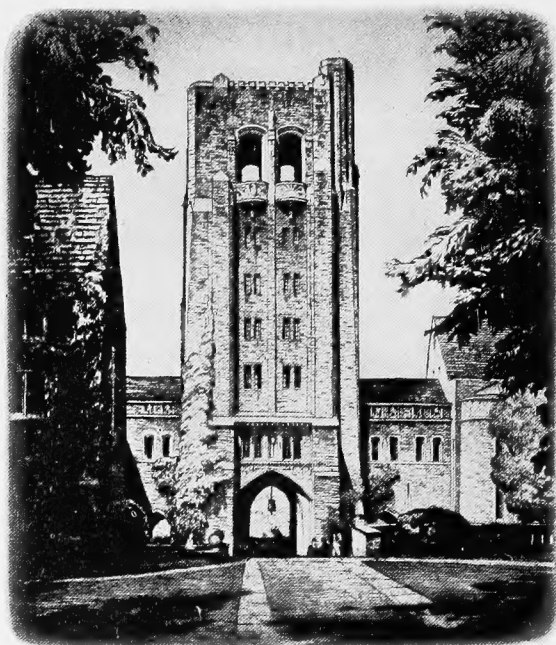


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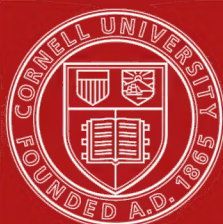
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**A TREATISE**  
**ON THE LAW OF**  
**MUNICIPAL CORPORATIONS**

**By EUGENE McQUILLIN**  
**AUTHOR OF MUNICIPAL ORDINANCES, AND**  
**JUDGE OF THE EIGHTH JUDICIAL**  
**CIRCUIT, MISSOURI**

***IN SIX VOLUMES***

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# A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS.

## VOLUME 2.

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### CHAPTER 12.

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### 1. MUNICIPAL ELECTIONS.

#### § 411. Regulation of offices and officers in general.

Ordinarily in municipal corporations the time and manner of the selection of the principal public officers, either by election or appointment, their tenure of office, powers, duties and liabilities, their official oaths and bonds are regulated by the State Constitution, general laws, municipal charter and ordinances. In the absence of express authority the right to select officers and agents by every corporation in order to carry out the purpose of its formation and intended existence is said to be a common law incident.<sup>1</sup>

Unless expressly restricted by state regulations the local corporation has full control over all its offices and officers.<sup>2</sup> But it is held that the legislature may pre-

1. *Lafayette v. State*, 69 Ind. 218; *People v. Stevens*, 51 How. Pr. (N. Y.) 103.

2. *California*. *People v. Hill*, 7 Cal. 97.

*Connecticut*. *Samis v. King*, 40 Conn. 298.

*Indiana*. *Madison v. Korbly*, 32 Ind. 74.

*New York*. *People v. Conover*, 17 N. Y. 64; *People v. New York*, 5 Barb. (N. Y.) 43; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35.

*South Carolina*. *Caulfield v. State*, 1 S. C. 461.

*Tennessee*. *Waldraven v. Memphis*, 4 Coldw. (Tenn.) 431.

See § 176 *ante*.

**Regulation of selection of municipal officers.** Usually city officers are elected by the voters of the municipality or appointed by officers elected by them. *Brown v. Holland*, 97 Ky. 249, 30 S. W. 629.

Where the right of election is conferred by the constitution such provision cannot be evaded by the change in the name of an office, nor can an office be divided and



scribe the qualifications of local officers.<sup>3</sup> The power to regulate and control municipal offices and officers as distinguished from state is treated fully in the chapter on legislative control.<sup>4</sup>

## § 412. How municipal elections are regulated.

The regulation of municipal elections is usually by constitution and general law.<sup>5</sup>

Municipal corporations are authorized to hold popular elections for the purpose of choosing municipal officers, to vote on propositions, as the acceptance of a legislative act, or propositions to amend or repeal charters, to adopt a new charter, to issue bonds, to establish water-works, lighting plants, etc., to raise money for extraordinary expenditures, to increase municipal indebtedness, etc. Many charters, or the law applicable, provide that the question of the expenditure of money for these and other purposes shall be submitted to the voters at a general or special election, sometimes by resolution or ordinance adopted by the law-making authorities.<sup>6</sup>

the duties assigned to two or more officers under different names. *People v. Albertson*, 55 N. Y. 50.

Power vested in the legislature to provide for the incorporation, organization, and classification of municipal corporations, includes power to specify how offices may be filled. *Vineyard v. Grangeville*, 15 Idaho 436, 98 Pac. 422.

The Constitution of New York requires the election of city magistrates to be by the electors of the entire city, and a charter provision for the election of city magistrates by the electors of each congressional district is invalid. *People v. Dooley*, 171 N. Y. 74, 63 N. E. 815.

Authority to elect a mayor may

be implied. *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869.

3. *State v. Von Baumbach*, 12 Wis. 310.

As to the power of state to create offices within a city for specified purposes, rendering city liable for their acts, see *Daley v. St. Paul*, 7 Minn. 390.

4. Chapter IV, §§ 173-183 *ante*.

5. § 177 *ante*.

6. *Directory as to time of assessing tax*. A statute authorized the trustees of a village to raise money for extraordinary expenditures by submitting a resolution to the voters stating the amount and specifying the object. The proposition was carried. The statute declared that the trustees

### § 413. How qualification of electors prescribed.

The qualification of electors or persons authorized to vote at municipal elections, are usually prescribed by the State Constitution and laws, and such provisions are controlling in the conduct of municipal and elections of all kinds by the people. When so prescribed, it is a self-evident proposition that the local corporation cannot by charter, ordinance or otherwise depart from the method laid down.<sup>7</sup> Regulation touching the qualifications of voters do not properly fall within the purview of this work.

Unless the provisions conflict with the general law of the state the municipal corporation is authorized, by charter or ordinance to provide that the voters shall be registered in a manner prescribed.<sup>8</sup>

To entitle one to vote at municipal elections he is required to have been a resident of the city or town for a specified period.<sup>9</sup>

shall, within twenty days after the proposition is voted proceed to assess the amount thereof. Held, the provision to be directory, and hence the validity of tax is not affected by failure to assess the same within twenty days. *Witherill v. Mosher*, 9 Hun (N. Y.) 412.

Under a statute relating to assessing property in school districts for school purposes which requires the tax voted at a district meeting to be assessed within one month after the meeting at which it was voted, it was held that the trustees could lawfully assess it after the expiration of the month—the statute being directory and not mandatory. *Gale v. Mead*, 2 Denio (N. Y.) 160; *Thomas v. Clapp*, 20 Barb. (N. Y.) 165.

7. *Petty v. Tooker*, 21 N. Y. 267; *People v. Canady*, 73 N. C. 198, 21 Am. Rep. 465; *Newling v. Francis*, 3 T. R. 189.

8. *Mahon v. Savannah*, 66 Ga. 217.

9. *Elector*. Under a constitutional provision prescribing that all city, town and village officers shall be elected by the electors of such city, etc., it was held that, the words “electors of said cities,” etc., means residents who have the qualifications of electors prescribed by the Constitution. *State v. Tuttle*, 53 Wis. 45, 9 N. W. 791.

*Municipal election*. In English law “municipal election” means an election to a corporate office. 45 and 46 Vict., ch. 50, § 7.

### § 414. Time and place of election.

The usual rule is that the election must be held at the time and place and in the manner provided by the charter or statute applicable.<sup>10</sup> However, it is held that the corporate authorities may hold an election for municipal officers at a different time than that specified by ordinance.<sup>11</sup> So municipal officers need not be elected on the day prescribed by the charter, for in the absence of express prohibition or fraud, the election may be held legally after the time fixed for holding it has passed.<sup>12</sup> Thus where the proper authorities fail to give

10. **Place of holding.** Charter required election to be held at the court house. It appears that no court house had been erected in the town. An election held within the corporate limits where the municipal business was transacted, was held sufficient. *Slate v. Blue Ridge*, 113 Ga. 646, 38 S. E. 977.

**Time of holding.** Act provided that it should be submitted to the voters, and if the act then failed of adoption, the same might, after the expiration of twelve months from the first election, be submitted at another election. Held, that a second election, which was actually held more than twelve months after the first was not void merely because the call fixing its date was made and notice thereof published, before the twelve months had expired. *Slate v. Blue Ridge*, 113 Ga. 646, 38 S. E. 977.

See § 147 *ante*, as to election on creation of the municipal corporation and change of boundaries.

§ 269 *ante*, elections annexing territory.

11. *Tharin v. Seabrook*, 6 S. C. 113.

12. *Lynch v. Lafland*, 44 Tenn. (4 Coldw.) 96.

**Time of election.** Where the members of a corporation are directed to be elected annually the words are only directory, and do not take away the power incident to the corporation to elect afterwards when the annual day has, by some means, free from design or fraud, been passed by. 2 Kent's Com. 295; *Coles County v. Allison*, 23 Ill. 437.

Charter prescribed annual election of directors. Held, directory; its observance not necessary to validity of election. *Hughes v. Parker*, 20 N. H. 58, 71, 72.

Provisions as to elections of officers by councils, etc., as to time, held directory. *State ex rel. v. Smith*, 22 Minn. 218, 223.

A mistake in the records of an election as to the time of holding, is immaterial; the election being held on the day appointed. *Claybrook v. Rockingham County*, 114 N. C. 453, 19 S. E. 593.

notice of an election for municipal offices at the time prescribed by law they may lawfully do so at a subsequent time, as the officers exercise the functions of their respective offices until their successors are elected.<sup>13</sup>

The same rule usually applies to elections and appointments to office by executive officers of the municipal corporation or by the council or governing legislative body.<sup>14</sup> Thus in a Minnesota case, the charter required the election to be at its first annual meeting. The council met, but adjourned *sine die* without having made an election. Afterwards the council met and had an election which was held valid. The court said: "So far as relates to the time when such election should be made, the statute is simply directory. Having neglected its duty at the proper time, from whatever cause, the obligation still rested upon it to elect at the earliest opportunity."<sup>15</sup> So in a Massachusetts case the charter provided that the officer should be elected within a certain month but in a case where the two branches of the legislative body were unable to agree within the period named, it was ruled that the election might be held at a later time in the absence of express legal prohibition.<sup>16</sup> However, a charter expressly designating a day upon which the election by the council should take place is an absolute prohibition to hold an election upon a day prior to that specified.<sup>17</sup> And if the law fixes the time, it cannot be

Act requiring election to be held in forty days, held directory only. *Wilmington, etc. R. Co. v. Onslow County*, 116 N. C. 563, 21 S. E. 205.

On propositions, etc. *State v. Blue Ridge*, 113 Ga. 646, 38 S. E. 977.

Of town officers. *Stone v. Small*, 54 Vt. 498; *State v. Harris*, 52 Vt. 216.

13. *People ex rel. v. Fairbury*, 51 Ill. 149.

Officers hold till election of suc-

cessors. Charter required annual election of all officers. Time allowed to pass. Held, old officers continue in office until others are elected. *State ex rel. v. Wilson*, 80 Tenn. (12 Lea) 246.

14. *Smith v. Bogaskie*, 109 N. Y. S. 598, 58 Misc. Rep. 243.

15. *State ex rel. v. Smith*, 22 Minn. 218, 223.

16. *Russell v. Wellington*, 157 Mass. 100, 31 N. E. 630.

17. *State v. Murray*, 41 Minn. 123, 42 N. W. 858.

changed by ordinance.<sup>18</sup> But if the Constitution, state statute or municipal charter fixes no time for the annual election the mayor and governing legislative body may prescribe the time.<sup>19</sup>

A constitutional provision that all city officers shall be elected at the general November elections, but only in odd years, was held to apply only to elections for full terms and not to elections to fill unexpired terms.<sup>20</sup>

Under the laws of New York, when the commencement of the term of an elective officer is fixed by law, elections for such office must take place at the last election held before the beginning of such term.<sup>21</sup>

A charter provision requiring the city clerk to state in his notice of election the officers to be elected at any election so provided by law, does not authorize such

18. *State v. Hoff*, 88 Tex. 297, 31 S. W. 290, reversing 29 S. W. 672.

19. *State v. Thomas*, 102 Mo. 85, 14 S. W. 108; *State v. Hoff* (Tex. Civ. App.), 29 S. W. 672.

Time may be changed. *People v. Haskell*, 5 Cal. 357; *People v. Woodruff*, 32 N. Y. 355, 29 How. Pr. 203; *Tharin v. Seabrook*, 6 S. C. 113.

What law controls. *State v. Patton*, 32 La. Ann. 1200.

When charter amendment does not change time. *State v. Phillips*, 30 Fla. 579, 11 So. 922.

Time, when none prescribed. An election at a special meeting where all the members of the body have not had notice thereof was held void. *People v. Batchelor*, 22 N. Y. 128.

Where a city is redistricted into wards. *State v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027.

A statute providing that the

qualified electors of each ward in certain cities shall annually elect one alderman for a term of two years is not inconsistent with, nor repealed by, a later statute which provides that the electors of such cities shall, every two years elect two aldermen from each of the several wards of such cities to hold for two years. *Dunton v. People*, 36 Colo. 128, 87 Pac. 540; *People v. Lawson*, 36 Colo. 442, 87 Pac. 543; *People v. Burrell*, 36 Colo. 444, 87 Pac. 543.

20. *Smith v. Doyle*, 25 Ky. L. Rep. 953, 76 S. W. 519.

Certificate of nomination. Laws requiring that certificates of nominations for city offices shall be filed a certain time before the elections are held not to apply to nominations for county offices. *Annapolis v. Gadd*, 97 Md. 734, 57 Atl. 941.

21. *People v. Auburn*, 82 N. Y. S. 172, 83 App. Div. 554.

clerk, in the absence of statute, to determine the year in which such elections shall take place.<sup>22</sup>

If the constitution requires existing city officers to be elected or appointed by such authorities as the legislature shall designate, the legislature has no power to extend the term of city magistrates by an amendment to the city charter.<sup>23</sup>

### § 415. Mode prescribed for election to be followed.

The law usually prescribes the manner in which the municipal officers are to be elected or appointed, and such mode must, in substance, be observed.<sup>24</sup> The choice of an officer in a manner different from the method prescribed by charter or ordinance is void.<sup>25</sup> Hence, a municipal council cannot elect its own members when the law prescribes they shall be elected by ballot by the qualified voters of the corporation.<sup>26</sup>

Ordinarily the mayor and the other chief officers including the members of the council or governing body

22. *People v. Auburn*, 82 N. Y. S. 172, 83 App. Div. 554.

23. *Kelly v. Van Wyck*, 71 N. Y. S. 814, 35 Misc. Rep. 210.

An election to fill a vacancy may be held at an adjourned meeting of the borough council where the adjournment was to a date fixed "for the purpose of closing up the old business of the council." *Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404.

24. *Louisiana. Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345.

*New Jersey. State v. Jersey City*, 29 N. J. L. 441; *State v. Paterson*, 35 N. J. L. 190; *Douglass v. Essex County*, 38 N. J. L. 214.

*New York. Kennedy v. New York*, 79 N. Y. 361.

*North Carolina. Baxter v. Ellis*, 111 N. C. 124, 15 S. E. 938.

*Ohio. Huddleson v. Ruffin*, 6 Ohio St. 604; *Bellows v. Cincinnati*, 11 Ohio St. 544.

*England. Rex v. Chitty*, 5 A. & E. 607; *Rex v. Spencer*, 3 Burr 1827; *Rex v. Weymouth*, 7 Mod. 373.

25. *Massachusetts. Saunders v. Lawrence*, 141 Mass. 380.

*Michigan. Baker v. Port Huron*, 62 Mich. 327.

*New Jersey. State v. Hudson*, 29 N. J. L. 104; *State v. Michelon*, 42 N. J. L. 405.

*Ohio. State v. Bryson*, 44 Ohio St. 457.

*Vermont. Stone v. Small*, 54 Vt. 498.

26. *Kearney v. Andrews*, 10 N. J. Eq. (2 Stockton) 70.

are elected by the qualified voters of the local corporation while others are elected or appointed by the mayor or legislative body,<sup>27</sup> or appointed by the mayor and confirmed by the council.

In case the legislative body is authorized to select officers and no particular manner is prescribed, this may be by resolution instead of by ballot.<sup>28</sup> Thus the election of an officer by the board of mayor and aldermen may be accomplished by the adoption of a resolution, under a charter providing that such board may elect or appoint officers.<sup>29</sup>

The election of officers by the mayor and council, under an ordinance enacting that they shall be "chosen by ballot," must be conducted according to the rules of common law.<sup>30</sup> Under a law providing for the election of certain designated officials by a majority vote of "all"

27. *Kirkham v. Russell*, 76 Va. 956, 958.

28. *Low v. Commissioners*, R. M. Char. (Ga.) 302.

29. *Huey v. Jones*, 140 Ala. 479, 37 So. 193.

**Mode, when none is prescribed.** When the office of police justice is created by statute, such justice may, in the absence of statutory provision, be elected in such proper mode as the mayor and board of aldermen may choose. *Rich v. McLaurin*, 83 Miss. 95, 35 So. 337.

The action of a village board in providing for an election of local officers, though unauthorized, does not render the election of such officers void. *State ex rel. v. Northrup*, 79 Neb. 822, 113 N. W. 540.

In event the mayor refuses to call a joint session of the council, at the request of members thereof, for the purpose of electing a mar-

ket master, as he is required by ordinance to do, such meeting may be called by the clerk of the board of council, by notice served upon them to elect such officer, and an election there held by a majority of both boards in joint session is valid. *Davis v. Claus*, 30 Ky. L. Rep. 1082, 100 S. W. 263.

If the ballots cast at an election for two aldermen, one a candidate for a long term and the other for a short term, fail to show the respective terms for which each has been elected, the certificates of nomination stating for which each candidate has been nominated, accepted in writing by each of the candidates, are matters of public record under the statutes, and will be referred to in order to solve the ambiguity. *Winters v. Warmolts*, 70 N. J. L. 615, 56 Atl. 245.

30. *Murdock v. Strange*, 99 Md. 89, 57 Atl. 628.

the members of the council, which is composed of the mayor and five aldermen, the mayor is entitled to a vote at such an election, and three votes are not a majority sufficient to elect.<sup>31</sup> However, the veto power of the mayor is not applicable to the election of officers, under a charter providing that the board of mayor and aldermen may elect or appoint officers, and that the mayor shall have no vote except in case of a tie.<sup>32</sup>

In a New York case, a constitutional section providing for the election of city judicial officers by vote of the electors of the entire city was held to mean the electors of the entire city at the time of the creation of the office.<sup>33</sup> And in a Nevada case a law prescribing that there shall be elected one councilman in each ward of a named municipal corporation who shall be a resident therein was construed to mean that each councilman shall be chosen by the electors of his ward.<sup>34</sup>

### § 416. Same—irregularities.

It is sometimes provided that municipal elections shall be called by a particular agency and when so required the rule will be rigidly enforced by the courts. Hence, where the law requires the mayor and city council to call the election the mayor must act in conjunction with the council, for neither the mayor nor the council alone may legally call the election.

Statutes merely regulating the manner of conducting an election are usually regarded as directory, and hence, a departure from the mode prescribed will not ordinarily vitiate the election.<sup>35</sup> Where, however, a statute

31. *People v. Herring*, 30 Colo. 445, 71 Pac. 413.

32. *Huey v. Jones*, 140 Ala. 479, 37 So. 193; *Bousquet v. State*, 73 Miss. 478, 29 So. 399.

33. *People v. Dooley*, 75 N. Y. S. 350, 69 App. Div. 512, 171 N. Y. 74, 63 N. E. 815.

34. *State v. Sadler*, 25 Nev.

131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 753.

35. *Enos v. State*, 131 Ind. 560, 31 N. E. 357; *Gilleland v. Schuyler*, 9 Kan. 569; *Jones v. State*, 1 Kan. 273; *Clark v. Hardison*, 40 Texas Civ. App. 611, 90 S. W. 342; *Loomis v. Jackson*, 6 W. Va. 613.

But see *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005.



declares in express terms that certain acts are essential to the validity of an election, the omission of such acts will usually render the election void whether it affects the result of the election or not.<sup>36</sup> Mere misconduct of election officials not affecting the result of the election will not vitiate it.<sup>37</sup> But where the result is thereby rendered doubtful the election is a nullity.<sup>38</sup> The rule usually applied is that mere informalities or irregularities in an election which do not affect the result will not invalidate it.<sup>39</sup>

36. *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491.

37. *California*. *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30; *Abbott v. Hartley*, 143 Cal. 484, 77 Pac. 410.

*Indiana*. *Gass v. State*, 34 Ind. 425; *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254.

*Kentucky*. *Anderson v. Winfree*, 85 Ky. 597, 4 S. W. 351, 9 Ky. L. Rep. 181; *Clarke v. Leathers*, 9 Ky. L. Rep. 558, 5 S. W. 576.

*Nebraska*. *Bingham v. Broadwell*, 73 Neb. 605, 103 N. W. 323.

See § 147 *ante* as to election on creation of municipal corporations and change of boundaries. § 269 *ante*, elections annexing territory.

38. *Howell v. Pate*, 119 Ga. 537, 46 S. E. 667; *State v. Judge*, 13 Ala. 805; *Webster v. Byrnes*, 34 Cal. 273; *Pennington v. Hare*, 60 Minn. 146; *Hartt v. Harvey*, 19 How. Pr. (N. Y.) 245.

39. *Arizona*. *Territory v. Mohave County* (Arizona, 1887), 12 Pac. 730.

*California*. *Sprague v. Norway*, 31 Cal. 173; *Gorham v. Campbell*, 2 Cal. 135.

*Florida*. *State v. Burbridge*, 24 Fla. 112, 3 So. 869.

*Illinois*. *Bacon v. Malzacher*, 102 Ill. 663; *Platt v. People*, 29 Ill. 54.

*Indiana*. *Gass v. State*, 34 Ind. 425.

*Kansas*. *Jones v. Caldwell*, 21 Kan. 186; *Russell v. State*, 11 Kan. 308; *Gilleland v. Schuyler*, 9 Kan. 569.

*Louisiana*. *Webre v. Wilton*, 29 La. Ann. 610.

*Massachusetts*. *Walker v. Boylston*, 128 Mass. 550.

*Minnesota*. *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002.

*Missouri*. *O'Laughlin v. Kirkwood*, 107 Mo. App. 302, 81 S. W. 512.

*New Jersey*. *Lehlbach v. Haynes*, 54 N. J. L. 77, 23 Atl. 422.

*North Carolina*. *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545; *In re Skerrett*, 2 Parson Eq. Cas. 509.

*Pennsylvania*. *Thompson v. Ewing*, 1 Brewst. 671, 5 Phila. 102; *McKinney v. O'Connor*, 26 Texas

In event the charter requires the election to be by ballot, in the absence of evidence to the contrary, the law will presume that the officer was so chosen.<sup>40</sup>

In a Kentucky case it was decided that the election of the members of a board of education by secret ballot instead of *viva voce* vote, as required by the statute, is not void, it not appearing that the final result was affected by the method of selection.<sup>41</sup>

The vote required in elections by the council or governing legislative body is considered in another part of this work.<sup>42</sup>

### § 417. Election of ineligible person to office is void.

If the person elected to an office does not possess the necessary legal qualifications, his election is a nullity.<sup>43</sup>

5; *Hannah v. Shepherd*, Tex. Civ. App. (1894), 25 S. W. 137.

*West Virginia*. *Loomis v. Jackson*, 6 W. Va. 613.

40. *Blanchard v. Dow*, 32 Me. 557; *Hathaway v. Addison*, 48 Me. 440.

Election must be at legal meeting of the town. *Bearce v. Fossett*, 34 Me. 575.

41. *Cynthiana v. Board of Education*, 21 Ky. L. Rep. 731, 52 S. W. 969.

**Mode prescribed to be observed.** The election of members of a board of education by secret ballot is void, under a charter requiring elections to be by the qualified voters of the city, but such members are *de facto* officers as to all persons, and their acts are entitled to full faith and credit. *Elliot v. Burke*, 24 Ky. L. Rep. 292, 68 S. W. 445.

Laws providing that the city council shall be composed of a mayor, and two councilmen from

each ward to be elected in alternate years, are repealed by a statute declaring that such council shall consist of two councilmen at large and one councilman from each ward and providing for the manner in which such councilmen shall be elected; and the election of the council must be conducted in accordance with the provisions of the amendment. *State v. Payton*, 139 Iowa 125, 117 N. W. 43.

42. Chapter 13 *post*.

43. *California*. *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

*Georgia*. *State v. Swearingen*, 12 Ga. 23.

*Kansas*. *Wood v. Bartling*, 16 Kan. 109.

*Kentucky*. *Patterson v. Miller*, 59 Ky. (2 Metc.) 493.

*Maryland*. *Kean v. Rizer*, 90 Md. 507, 45 Atl. 468.

*Michigan*. *People v. Galbraith*, 163 Mich. 47, 127 N. W. 771, 17 Det. Leg. N. 781.

The fact that the candidate receiving the highest number of votes is ineligible will not entitle the next highest to the office. This is the prevailing rule in this country.<sup>44</sup>

The rule has been declared in Indiana that where the voters *without knowledge* elect an ineligible candidate to office his opponent, or the candidate receiving the next highest vote, is not entitled to the office.<sup>45</sup>

*Minnesota.* Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304.

*Missouri.* State v. Walsh, 7 Mo. App. 142; Snyder v. Newman, 91 Mo. 445, 3 S. W. 849.

*Nebraska.* State ex rel. v. Moores, 56 Neb. 1, 76 N. W. 530.

*Rhode Island.* In re Corliss, 11 R. I. 638.

*Wisconsin.* State ex rel. v. Giles, 1 Chand. (Wis.) 112, 52 Am. Dec. 149.

44. *Arkansas.* Swebston v. Barton, 39 Ark. 549.

*California.* Saunders v. Haynes, 13 Cal. 145.

*Georgia.* Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; Dobbs v. Buford, 128 Ga. 483, 57 S. E. 777.

*Louisiana.* State ex rel. v. Gas-tinel, 20 La. Ann. 114; Fish v. Collins, 21 La. Ann. 289.

*Maine.* In Opinion of Justices, 38 Me. 597; In Opinion of Justices, 7 Me. 497.

*Michigan.* Lamoreaux v. Ellis, 89 Mich. 146, 50 N. W. 812; Crawford v. Molitor, 23 Mich. 341.

*Minnesota.* Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304.

*Mississippi.* Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338.

*Missouri.* State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. Walsh, 2 McQ.—2

7 Mo. App. 142; Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082.

*Nebraska.* State ex rel. v. Boyd, 31 Neb. 682, 48 N. W. 739; Gardner v. Burke, 61 Neb. 534, 85 S. W. 541.

*New York.* People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

*Pennsylvania.* State ex rel. v. Cluley, 6 Pa. 270, 94 Am. Dec. 75.

*Wisconsin.* State ex rel. v. Giles, 2 Pinney (Wis.) 166, 52 Am. Dec. 149; State ex rel. v. Smith, 14 Wis. 497.

*West Virginia.* Dryden v. Swinburne, 20 W. Va. 89.

45. *Indiana.* Rule when ineligible person receives the highest vote. "While the rule affirmed by the authorities is that a majority or plurality of votes cast at a popular election for a person ineligible to the office for which such votes are cast does not, as a general rule, confer any right or title to the office upon such an ineligible candidate, nevertheless the votes so cast will be effectual to prevent the election of an eligible person who receives the next highest number of votes *in the absence of proof of the fact that the votes cast for the ineligible candidate were given by the electors with the full knowledge either actual or constructive, of his ineligibility.*

In an early case in that state the doctrine is thus stated: "Where at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but from a fact or cause which the voters did not and were not bound to know, the result is failure, and gives no candidate the right to the office, and should be followed by another election."

\* \* \* Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know, of the ineligibility of a candidate, the election does not result in a failure; but, in such case, the eligible candidate receiving the highest number of votes is legally elected and entitled to the office."<sup>46</sup>

This appears to be the English rule, and it has been often followed in Indiana.<sup>47</sup>

**§ 418. How is vote required to be determined? Are all the qualified electors or only those voting at the given election to be counted?**

The established rule is that, in all elections the vote specified by the law must be obtained, to render valid the results.<sup>48</sup>

*ty.*" *State v. Bell*, 169 Ind. 61, 67, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, citing *Com. v. Cluley*, 56 Pa. St. 270, 94 Am. Dec. 75; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508.

In Indiana it had been repeatedly held that "votes cast for a person not eligible to an office cannot be counted against the opposing candidate who is eligible." *Copeland v. State*, 126 Ind. 51, 25 N. E. 866; *Waldo v. Wallace*, 12 Ind. 569; *Carson v. McPhetridge*, 15 Ind. 327; *Howard v. Shoemaker*, 35 Ind. 111; *State ex rel. v. Gallagher*, 81 Ind. 558; *State ex rel. v. Johnson*, 100 Ind. 489.

However the rule that the votes cast for the ineligible candidate

cannot be counted against the opposing candidate was held not applicable where two or more are running for different offices. *Price v. Baker*, 41 Ind. 572, 13 Am. Rep. 346.

46. *Gulich v. New*, 14 Ind. 93, 77 Am. Dec. 49.

47. *Carson v. McPhetridge*, 15 Ind. 327; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164; *Hoy v. State*, 168 Ind. 506, 81 N. E. 509; *State v. Bell*, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, limiting *State v. Gallagher*, 81 Ind. 558, and *State v. Johnston*, 100 Ind. 489.

48. See § 147 *ante*, relating to election to incorporate and change municipal limits.

In specifying the vote required, laws vary in phraseology, e. g. some recite "a majority of the legal voters" (of the city, county or district);<sup>49</sup> others, "a majority of the qualified voters,"<sup>50</sup> others, "three-fifths of the qualified voters of such city, *voting* at a general or special election;"<sup>51</sup> others, that the proposition must be "accepted by at least three-fifths of the qualified voters *voting thereat*,"<sup>52</sup> others, that the proposition must secure "the assent of two-thirds of the voters (of the county, city, town, township, etc.),"<sup>53</sup> or the "qualified voters *voting at an election to be held for that purpose*."<sup>54</sup>

Unless the law provides otherwise, either in express terms or by necessary implication, the preponderance of judicial decisions hold that, if the officer or proposition receives the required number of legal votes cast at the particular election (whether a majority, two-thirds, three-fourths or any other named proportion), the officer will be declared legally elected or the proposition duly carried, notwithstanding, such votes do not constitute the required number when all the qualified voters of the electorate are counted.<sup>55</sup>

49. Const. Mo. 1875, art. IX, § 8.

50. Vance v. Anstell, 45 Ark. 400.

51. Const. Mo. 1875, art. IX, § 16.

52. Const. Mo. 1875, art. IX, § 22.

53. Cass County v. Johnston, 95 U. S. 360.

54. Const. Mo. 1875, art. X, § 12.

55. Arizona. Cronly v. Tucson, 6 Ariz. 235, 56 Pac. 235.

Arkansas. Futrell v. Anstell, 45 Ark. 400.

California. Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014; Howland v. Board of Supervisors, 109 Cal. 152, 41 Pac. 864.

Florida. Pickett v. Russell, 42 Fla. 116, 139, 28 So. 764; State v. Padgett, 19 Fla. 518.

Idaho. Green v. State Board, 5 Idaho 130, 47 Pac. 259.

Illinois. Kuns v. Robertson, 154 Ill. 394, 40 N. E. 343; People v. Harp, 67 Ill. 62; Dunnovan v. Green, 57 Ill. 63; People v. Wiant, 48 Ill. 263.

Indiana. South Bend v. Lewis, 138 Ind. 512, 37 N. E. 986.

Iowa. Taylor v. McFadden, 84 Iowa 263, 50 N. W. 1070.

Kansas. State v. Echols, 49 Kan. 1.

Kentucky. Board of Education v. Winchester, 120 Ky. 59, 87 S. W. 768; Pratt v. Breckinridge, 112

These decisions regard this as the mode contemplated by the law for ascertaining the will of the legal voters upon the question submitted, and many express the opinion that there cannot well be any other practical way in which such a matter can be determined. In the absence of evidence to the contrary, this doctrine presumes that the voters voting at an election so held in pursuance of law and on proper notice, were all the legal voters of the electorate; or, that all those who did not see fit to vote, acquiesced in the action of those who did vote, and are so to be considered as equally bound and concluded by the result of the election.

*Ky.* 1, 65 S. W. 136; *Montgomery County v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738, overruling *Belknap v. Louisville*, 99 Ky. 474, 36 S. W. 1118.

*Louisiana.* *De Soto Parish v. Williams*, 49 La. Ann. 422, 21 So. 647, 37 L. R. A. 761; *Duperier v. Viator*, 35 La. Ann. 957.

*Maine.* *Foy v. Gardiner Water District*, 98 Me. 82, 56 Atl. 201.

*Maryland.* *Murdock v. Strange*, 99 Md. 89, 57 Atl. 628; *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711.

*Michigan.* *Shearer v. Board of Supervisors*, 128 Mich. 552, 87 N. W. 789.

*Minnesota.* *Everett v. Smith*, 22 Minn. 53; *Bayard v. Klinge*, 16 Minn. 249; *Taylor v. Taylor*, 10 Minn. 107.

*Missouri.* *Richardson v. McReynolds*, 114 Mo. 641, 21 S. W. 901; *State ex rel. v. St. Joseph*, 37 Mo. 270; *State v. Binder*, 38 Mo. 450, 456.

*Compare State v. Sutterfield*, 54 Mo. 391.

*Nevada.* *State v. Ruhe*, 24 Nev. 251, 52 Pac. 274.

*New Hampshire.* *Atty. Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576.

*New Jersey.* *State v. Otis*, 68 N. J. L. 64, 52 Atl. 305.

*New York.* *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312; *Rome v. Whitestown Water Works Co.*, 113 N. Y. App. Div. 547, 100 N. Y. S. 357, affirmed 187 N. Y. 542, 80 N. E. 1106.

*North Carolina.* *Reiger v. Beaufort*, 70 N. C. 319.

*Ohio.* *Rike v. Floyd*, 6 Ohio Cir. Ct. 80.

*Pennsylvania.* *Schlichter v. Keiter*, 156 Pa. St. 119, 27 Atl. 45.

*South Carolina.* *Bond Debt Cases*, 12 S. C. 200.

*Tennessee.* *Louisville, etc., R. Co. v. County Court*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

*Wisconsin.* *State v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; *Sanford v. Prentice*, 28 Wis. 358; *State v. Tierney*, 23 Wis. 430.

*United States.* *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *St. Joseph Tp. v. Rogers*,

On the other hand, in some jurisdictions the rule is that the specified proportion of votes (as a majority or two-thirds or three-fourths), required to elect an officer or carry a proposition means the named proportion of all electors entitled to vote at the particular election. The number is shown by the registration lists, or in event other officers or propositions were voted on at the same election than the office or proposition at issue, the number may be proved by the votes cast for other officers or propositions, or by the vote at the preceding election.<sup>56</sup>

If elections where the registration of voters is required (and this is usual in thickly settled communities), the number of legal voters may be ascertained. But in the absence of such listing of qualified electors ordinarily

16 Wall. (U. S.) 644, 21 L. Ed. 328; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517.

*England.* *Rex v. Fox-Croft*, 2 Burr 1017; *Willcock, Mun. Corp.* 546.

**Qualified voters means voters voting.** *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, holds that the constitutional requirement of Mississippi that two-thirds of the qualified voters of the county is necessary to carry a bond election, means two-thirds of the qualified voters present and voting. This is contrary to the holding in *Hawkins v. Carroll County*, 50 Miss. 735.

**Rebutting presumption as to whole vote.** The presumption that the votes cast at an election is that of the whole number of legal voters, cannot be rebutted by proof of the number of votes cast at an election held in the preceding

year. *Melvin v. Lisenby*, 72 Ill. 63. Nor can it be rebutted by the registry lists. *People v. Garner*, 47 Ill. 246.

**Two-thirds of voters of county required to move county seat.** *State v. White*, 162 Mo. 533, 63 S. W. 104; *State v. Francis*, 95 Mo. 44, 8 S. W. 1; *State v. Walker*, 85 Mo. 41; *Webb v. Lafayette County*, 67 Mo. 353; *State v. Sutterfield*, 54 Mo. 391.

56. *McKnight v. Senoia*, 115 Ga. 915, 42 S. E. 256; *State v. Blue Ridge*, 113 Ga. 646, 38 S. E. 977; *Floyd County v. State*, 112 Ga. 794, 38 S. E. 37; *Carver v. Dawson*, 99 Ga. 7, 25 S. E. 832; *Decatur v. Wilson*, 96 Ga. 251; *State v. Sutterfield*, 54 Mo. 391.

Where the Constitution requires "a vote in favor thereof by a majority of the electors of the city," a majority of all the electors of the city is required. *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063.

it is not practicable to obtain this information, except perhaps in sparsely populated regions. Thus it is often the case that the precise number of those entitled to vote at a given election cannot be known, at least without extraordinary efforts. Moreover, it is rarely the case that all of those legally qualified do vote at any given election. Experience has demonstrated time and time again that a large percentage of those entitled to vote fail to do so. Penalties could be imposed, of course, for omission in this respect, and thus a larger vote might be secured. But usually no penalties are inflicted. Other means of inducing voters to exercise their franchise might be adopted, but until some practical method is found to compel each elector to vote (and this is hardly probable), the reasonable rule would seem to be, to avoid the great inconvenience, and in many cases the impracticability, of endeavoring to ascertain the precise number entitled to vote,<sup>57</sup> and hold that all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority or the two-thirds or three-fourths, as the law specifies, of those voting, unless the law providing for the election otherwise declares.<sup>58</sup>

**§ 419. Same—determination of vote on a separate proposition when other issues are submitted at the same election.**

In event the particular proposition is voted on at an election when other propositions or the election of officers are submitted, the question is presented whether in

57. *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343.

58. *Cass County v. Johnson*, 95 U. S. 360, 24 L. Ed. 416.

**Qualified voter.** "The words, qualified voters, as used in the Constitution, must be taken to mean, not those qualified and en-

titled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote." *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517.



ascertaining the vote on the given proposition the greatest number of votes cast at the election for any office or on any other proposition should be counted, or only those votes cast on the proposition in issue. To adopt another form of statement of the question: In ascertaining the vote on the proposition involved, should the election be considered as an *entirety*, or as a *separate and distinct expression* of the popular voice on the given proposition?

In such case, many decisions hold that, where a majority vote is required a proposition is duly adopted if a majority of the voters voting on the particular proposition vote in its favor, although it does not receive a majority of all the votes cast at the election.<sup>59</sup>

On the contrary, other cases rule that there must be a majority of those who vote on any question or ticket or on any issue at such election, and hence, a mere majority of those voting on the particular proposition is insufficient.<sup>60</sup>

59. *Indiana*. *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986.

*Kansas*. *State v. Echols*, 49 Kan. 1; *Commissioners v. Winkley*, 29 Kan. 36.

*Maryland*. *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711.

*Minnesota*. *Dayton v. St. Paul*, 22 Minn. 400.

*Montana*. *Tinkel v. Griffin*, 26 Mont. 426, 68 Pac. 859.

*North Dakota*. *State v. Barnes*, 3 N. D. 319, 55 N. W. 883; *State v. Langlie*, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

*Oregon*. *State v. Grace*, 20 Or. 154, 25 Pac. 382.

*Washington*. *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379; *State v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

*West Virginia*. *Davis v. Browin*, 46 W. Va. 716, 34 S. E. 839.

*United States*. *Armour Bros. P. Co. v. Board of County Comrs.*, 41 Fed. 321.

60. *California*. "Majority of electors voting" means majority of all the electors voting. *People v. Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; *Santa Rosa v. Bower*, 142 Cal. 299, 75 Pac. 829.

*Illinois*. *Chestnutwood v. Hood*, 68 Ill. 132; *People v. Wiant*, 48 Ill. 263; *People v. Brown*, 11 Ill. 478.

*Indiana*. *State v. Swift*, 69 Ind. 505.

*Michigan*. *Stebbins v. Grand Rapids*, 108 Mich. 693, 66 N. W. 594.

*Minnesota*. *State v. Hugo*, 84 Minn. 81, 86 N. W. 784; *Bayard v. Klinge*, 16 Minn. 249.

Thus a proposition submitted at a general election, under a constitutional provision declaring the proposition should be carried "whenever a majority of the legal voters \* \* \* voting at a general election shall so determine," is not adopted legally on a majority vote of those voting on that proposition if such vote is less than a majority of all the votes cast at the election on any issue then submitted.<sup>61</sup>

In California a like ruling was made relating to an election where other propositions were voted on, under a law requiring a two-thirds vote "of the electors voting *at such special election*," although the particular proposition received the designated vote, but not two-thirds of the whole vote cast at that election. It appears that the provision above quoted was a change from the original law which required a two-thirds vote of "the electors voting *thereon*."<sup>62</sup>

In a Missouri case certain amendments to the St. Louis charter were submitted at a general election, under a constitutional provision requiring approval by "at least three-fifths of the qualified voters voting *thereat*." The amendments received more than three-fifths of all the votes cast on the question of their adoption, but less than three-fifths of all the votes cast at the election for municipal officers. The court held that the amendments were not adopted.<sup>63</sup>

*Missouri.* State v. St. Louis, 73 Mo. 435; State v. Winkelmeier, 35 Mo. 103.

*Nebraska.* State v. Roper, 46 Neb. 724, 61 N. W. 753; State v. Van Camp, 36 Neb. 91, 54 N. W. 113; State v. Clark, 59 Neb. 702, 82 N. W. 8; State v. Lancaster County, 6 Neb. 474.

*Ohio.* Enyart v. Hanover Tp., 25 Ohio St. 618.

61. State v. McGowan, 138 Mo. 187, 39 S. W. 771.

62. Law v. San Francisco, 144 Cal. 384, 396, 77 Pac. 1014.

63. "Voting thereon" and "voting thereat," distinguished. "The above provision of the Constitution is free from ambiguity, and giving to the words employed their natural and usual signification, we think it clear that before any amendment to the city charter can be adopted or made, such amendment must be accepted, that is, voted for, by three-fifths of the qualified voters voting at either a special or general election. If the framers of the Constitution

If the law recites qualified voters "voting on the proposition,"<sup>64</sup> or "voting on the question,"<sup>65</sup> or "a majority of all the votes cast upon that question,"<sup>66</sup> or a majority or two-thirds of the electors or qualified voters "voting *thereon*,"<sup>67</sup> the clear intention is to require the specified vote only on the particular proposition,<sup>68</sup> and this appears to be the judicial ruling in most of the cases. Such language establishes the legislative intention to treat the vote on the particular proposition as separate and distinct from the election on other issues. A like construction should apply in all other cases, unless the language of the law is such as to forbid it, and to demonstrate an unquestionable legislative intent to have the election considered as an entirety.

## 2. GENERAL CONSIDERATION CONCERNING OFFICES AND OFFICERS, SUBORDINATES AND EMPLOYEES.

### § 420. Designation and classification of officers and persons in the municipal service.

Persons holding any situation under the municipal government or its departments are variously designated, as members (e. g. of council or legislative body and of boards, etc.), officers, assistants, deputies, subordinates, employees of various kinds, clerks, agents and attorney.

intended that an acceptance by three-fifths of the qualified voters voting at said election on the proposed amendment would be sufficient to adopt it, they would have used the word *thereon* instead of *thereat*." *State v. St. Louis*, 73 Mo. 435, 437.

This is the established rule in Missouri. *State v. Winkelmeier*, 35 Mo. 103; *State v. Brassfield*, 67 Mo. 331.

*Contra*, *State v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

64. Const. Mo. 1875, art. IX, § 2.

65. Const. Mo. 1875, art. IX, §§ 3 and 4.

66. Const. Mo. 1875, art. IX, § 9.

67. Const. Washington, art. XI, § 10.

68. *State v. St. Louis*, 73 Mo. 435, 437; *State v. McGowan*, 138 Mo. 187, 39 S. W. 771; *Law v. San Francisco*, 144 Cal. 144, 396, 77 Pac. 1014.

See § 346 *ante*.

Officers are sometimes referred to as officers, chief officers, chief executive officers, administrative officers, chief law officers, heads of departments, chiefs of departments, fiscal officers and commissioners. Officers are either elected or appointed. They may be either state or municipal officers,<sup>69</sup> and, if the latter, either charter or ordinance officers.

Excluding mere employees, day laborers, temporary help, agents, attorneys, etc., as affecting the importance, independence and character of powers, functions and of salaries, those who serve the municipal corporation in public positions may be divided into three distinct classes: namely, (1) officers proper, (2) assistants or deputies, and (3) clerks. With respect of character of duties the officer may be executive and administrative, legislative or judicial.<sup>70</sup>

69. §§ 173 to 183 *ante*.

70. **Executive officer.** Under a statute declaring the police commissioner to be the chief executive officer of the police force, a deputy police commissioner who, during the absence of the commissioner, possesses all the powers and is required to perform all the duties of the commissioner, except the power of making appointments and transfers, is an executive officer. *McAvory v. Press Pub. Co.*, 99 N. Y. S. 1041, 114 App. Div. 540.

**Municipal officer.** A "municipal officer" is a city officer within the meaning of a constitutional provision limiting the terms of municipal officers to two years. *State v. Edwards*, 38 Mont. 250, 99 Pac. 940.

City treasurer is a "fiscal officer," under the Kentucky Constitution. *Dorain v. Walters*, 132 Ky. 54, 116 S. W. 313.

In English law "corporate officer" means the office of mayor, aldermen, councillor, and elective auditor. 45 and 46 Vict., ch. 50, § 7.

The office of "revising assessor" was included but repealed by the statute. Law Revision Act, 1898, 61 and 62 Vict., ch. 22.

Under our federal system, for the purposes of appointment, the Constitution divides all its officers into two classes. The primary class requires a nomination by the president and confirmation by the senate. In regard to officers inferior to these, the Congress may by law vest their appointment in the president alone, in the courts of law, or in the heads of departments. U. S. Const., art. 2, § 2.

"That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included with-

Classification under civil service laws of officers and persons in the municipal service vary.<sup>71</sup>

**§ 421. Relations in which question as to who are municipal officers is presented.**

The question as to who are municipal officers may arise in the relations following: (1) In the authority and manner of their election or appointment. (2) When the appointment or election is to take place. (3) The tenure of office. (4) Manner of filling vacancies in

in one or the other of these modes of appointment there can be but little doubt." Per Mr. Justice Miller in *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482.

An officer of the United States can only be appointed by the President, by and with the advice and consent of the senate, or by a court of law, or the head of a department. *U. S. v. Smith*, 124 U. S. 525, 532, 8 Sup. Ct. 595, 31 L. Ed. 534; *United States v. Mowat*, 124 U. S. 303, 307, 8 Sup. Ct. 505, 31 L. Ed. 463.

**71. Classification under civil service.** Under a statute dividing the civil service into a competitive and non-competitive class, a battalion chief of a fire department was held to be in the non-competitive class. *People v. Whittet*, 91 N. Y. S. 675, 100 App. Div. 176.

In the absence of bad faith or illegal action the court will not review the determination of the civil service commissioners in rating candidates in competitive examinations, either by *certiorari* or by *mandamus*. *People v. MeCooley*, 91 N. Y. S. 436, 100 App. Div. 240.

The classification of positions by the municipal civil service commission, although involving the exercise of judgment is not subject to review by *certiorari*. *People v. McWilliams*, 185 N. Y. 92, 77 N. E. 785.

The remedy for an illegal classification of positions is by *mandamus*. *People v. McWilliams*, 185 N. Y. 92, 77 N. E. 785.

Where a position in the civil service was changed from a class in which no examination was required for appointment, to another class in which such examination was required, an applicant for appointment whose application was filed after the change, was held not to be entitled to appointment without taking an examination. *People v. Adam*, 101 N. Y. S. 925, 116 App. Div. 613.

Under laws providing that "the chief of police shall be appointed from the classified list of such department," an appointment to such office, made before such list had been made up, and without an examination of the appointee, was held to be contrary to law. *State v. Stroble*, 25 Ohio Cir. Ct. R. 762.

office. (5) Power and method of removal or suspension. (6) Whether office or situation is created by statute, charter or ordinance. (7) Powers and functions of the office. (8) Qualifications of the incumbent. (9) Whether occupant is filling two offices or public places. (10) Whether the office or situation is under civil service regulations. (11) The liability of the incumbent. (12) Whether bond and oath are required. (13) Compensation or salary and the source of payment.

Municipal officers are distinguished from state officers in chapter four, relating to legislative control of municipal corporations, and municipal and state officers are there fully illustrated.<sup>72</sup> The mayor,<sup>73</sup> councilmen or aldermen,<sup>74</sup> city treasurer, etc., are municipal officers.<sup>75</sup>

## § 422. Nature and elements of the terms "office" and "officer."

The words office and officer are sometimes of uncertain import. They have been defined in various terms. In the several relations in which they are used different

72. §§ 173 to 183 *ante*.

73. *Britton v. Steber*, 62 Mo. 370.

When mayor is a state officer. *Attorney-General v. Detroit*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450.

74. *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *In re Newport Charter*, 14 R. I. 655; *Garvie v. Hartford*, 54 Conn. 440, 7 Atl. 723.

75. *State v. Wilmington*, 3 Harr. (Del.) 294; *State v. Walton*, 62 Me. 106; *Moose v. Lowell*, 7 Met. (Mass.) 152; *Newburyport v. Spear*, 204 Mass. 146, 90 N. E. 522; *Dorian v. Walters*, 132 Ky. 54, 116 S. W. 313.

Officer does not mean municipal, when. "It cannot be doubted as a general proposition of law applying to the construction of statutory and constitutional provisions alike, that the words 'offices' or 'officers' taken by themselves, in a statute or constitution, mean state or county 'offices' or 'officers' only, and cannot be construed to mean the offices or officers of municipal or other corporations, unless there be language expressly or by necessary implication extending their meaning to corporation officers." *State v. Churchman*, 3 Pennewill (Del.) 361, 51 Atl. 49, 50.

elements may be involved. Therefore, in order to determine the meaning of these words in a given case regard must be had to the intent and subject-matter of the law wherein they are employed. In ascertaining their meaning technical rules should be avoided, and courts should not be too precise in seeking for words and definitions.<sup>76</sup>

Usually the term "office" possesses no legal or technical meaning aside from the common acceptance. In its ordinary and proper signification the word is sufficiently comprehensive to embrace all persons in any public station or employment conferred by government, whether national, state or local.<sup>77</sup>

In the abstract, office signifies a place of trust. In legal idea an office is an entity and may exist in fact though it be without an incumbent.<sup>78</sup>

Office implies a duty and a discharge of that duty. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not for the profit, honor, or private interest of any one man, family or class of men. In our form of government it is fundamental that a *public office is a public trust*, and as well observed by the Supreme Judicial Court of Massachusetts, the person to be elected or appointed should be chosen solely with a view to the public welfare.<sup>79</sup>

76. *Ryan v. New York*, 50 How. Pr. (N. Y.) 91, 93; *Rowland v. Mayor*, 83 N. Y. 372, 376; *Re Wood*, 2 Cow. (N. Y.) 29, note; *People v. Comptroller*, 20 Wend. (N. Y.) 598; *State ex rel. Childs v. Kuchli*, 53 Minn. 147, 19 L. R. A. 779, 783, 54 N. W. 1069.

77. *Hill v. Boyland*, 40 Miss. 618, 625; *Matter of Oath*, 20 Johns (N. Y.) 493; *Vaugh v. English*, 8 Cal. 40; *People v. Brooklyn*, 77 N. Y. 503, 508, 33 Am. Rep. 659.

78. *People v. Stratton*, 28 Cal. 382, 388.

79. *Brown v. Russell*, 166 Mass. 14, 25, 48 N. E. 279, 55 Am. St. Rep. 357.

"A public office is a public trust." *Cooley's Const. Law*, 303, quoted with approval in *State ex rel. v. May*, 106 Mo. 488, 506, 17 S. W. 660.

Municipal officers, "in the discharge of their duties do not act for themselves, but for the public. They are trustees, clothed with a trust, not for the corporation as such, but for the citizens and public who have confided the author-

It has been well said by Chief Justice Marshall that an office "is a public charge or employment," and one performing the duties of an office is an officer.<sup>80</sup>

Judge Cooley says that "an office is a special trust or charge created by competent authority. If not merely honorary certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual and who for the time will be the officer."<sup>81</sup>

The right to hold office is not a natural right, but must be granted by law, and the functions of the office are controlled by the will of the people expressed by the laws relating to such public place.<sup>82</sup>

The power and jurisdiction of an officer constitute the office; are of the essence of it and inseparable from it.<sup>83</sup> But it is the substance of the powers exercised, the duty of the office, and the nature of that duty, which constitute the office, and not the extent of authority.<sup>84</sup>

ity to them." *Hitchcock v. St. Louis*, 49 Mo. 484, 488.

"Public officers are the trustees and servants of the people, and at all times, answerable to them." *Const. Ga.*, 1877, art. 1, § 1, part 1.

"Public offices are a public trust to be held and administered with the same exact justice and the same conscientious regard for the responsibilities involved as are required in the execution of private trusts." Wm. Wallace Crapo, opening address to the Massachusetts Republican State Convention, 1881.

Hon. Chas. J. Bonaparte, "The Movement for Honest Government." *Proceedings of National Municipal League at Boston*, 1902, p. 247.

80. *United States v. Maurice*, 2 Brock. (U. S.) 102; *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830.

81. *Throop v. Langdon*, 40 Mich. 673, 682, quoted in *State ex rel. v. Shannon*, 133 Mo. 139, 164, 33 S. W. 1137; *State ex rel. v. Johnson*, 123 Mo. 4, 52, 27 S. W. 399, and *State ex rel. v. May*, 106 Mo. 488, 506, 17 S. W. 660.

See 2 *Black. Com.* 36; 3 *Kent's Com.* 454; *Gosman v. State*, 106 Ind. 203.

82. *Opinion of Warner, J.*, in *White v. Clements*, 39 Ga. l. c. 274; of *Allen, J.*, in *People v. Murray*, 70 N. Y. 521; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302.

83. *Com. v. Gamble*, 62 Pa. St. 343, 348, per *Thompson, C. J.*

84. *State v. Valle*, 41 Mo. 29; *Attorney General v. Drohan*, 169 Mass. 534, 48 N. E. 279; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 205; *State v. Boody*, 53 N. H. 610, 43 N. E. 205; *Lewis v. Jersey City*, 51 N. J. L. 240, 17 Atl. 112.



Usually, though not always, the duties of an office are prescribed by law and not by contract, or by a superior officer and are continuous.<sup>85</sup> Thus, one who has a public duty, charge or trust, conferred by public authority, for public purposes, which is not transient, occasional, or incidental, but durable, permanent, and continuous, is an officer.<sup>86</sup> But where the duties are not continuing and permanent, but are occasional and intermittent, as for example, civil surgeons appointed by the commissioner of pensions, they are not officers but agents of the commissioner.<sup>87</sup>

Emolument is usual but not a necessary element to constitute an office. Authority and power relating to the public interests, conferred by law and which may be vested in a board or individuals by election or appointment, create an office.<sup>88</sup>

Some cases hold that the taking of an official oath is an essential characteristic of a public office.<sup>89</sup>

It is thus manifest that an office involves the idea of *tenure*, *duration*, fees or *emoluments*, and *powers*, as well as that of *duty*. It implies an authority to exercise some portion of the sovereign power of the state, great or small, or some portion of the powers of a municipal corporation, either in making, interpreting, administering, or executing laws.<sup>90</sup> This has been given as a funda-

85. *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174; *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830.

86. *State ex rel. v. Kennon*, 7 Ohio St. 546, 556; *In re Oath*, 20 John. (N. Y.) 493.

87. *United States v. Germaine*, 99 U. S. 508, 512, 25 L. Ed. 482.

88. *State ex rel. v. Kennon*, 7 Ohio St. 546, 559.

89. *Fox v. Mohawk, etc. Socy.*, 48 N. Y. S. 625, 25 App. Div. 26, affirmed in 165 N. Y. 517, 59 N. E. 353; *State v. Slagle*, 115 Tenn. 336, 89 S. W. 326.

But see *Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

90. *Florida. State ex rel. v. Hocker*, 39 Fla. 477, 486, 22 So. 721.

*Maine. Opinion of the Judges*, 3 Me. (Greenleaf) 481.

*Massachusetts. Atty. Gen. v. Drohan*, 169 Mass. 534, 535, 48 N. E. 279, 61 Am. St. Rep. 301; *Atty. Gen. v. Tillinghast*, 203 Mass. 539, 89 N. E. 1058.

*New Jersey. Dailey v. Essex County*, 58 N. J. L. 319, 33 Atl. 739.

mental test.<sup>91</sup> Therefore, civil officers embrace such persons as in whom part of the sovereign or municipal regulations or general interests of society are vested.<sup>92</sup>

**§ 423. Same—the precise manner in which the question is presented is important.**

The relation in which the question arises, or, in which the terms of law involved are intended, is an important factor in ascertaining what is meant by office and officer;<sup>93</sup> e. g., whether one is an officer relating to the

*New York.* *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481.

*North Carolina.* *State v. Thompson*, 122 N. C. 493, 29 S. E. 720.

*Ohio.* *State v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723; *State v. Anderson*, 57 Ohio St. 429, 49 N. E. 406; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *United States v. Hatch*, 1 Pinney (Wis.) 182.

See note to *State v. Hocker*, 63 Am. St. Rep. 181.

91. *Eliason v. Coleman*, 86 N. C. 235, approved in *State ex rel. v. Hocker*, 39 Fla. 1. c. 485, 22 So. 721.

92. *State ex rel. v. Jennings*, 57 Ohio St. 1. c. 424 *et seq.*

Further definitions and descriptions appear in *State v. Spaulding*, 102 Iowa 639, 72 N. W. 288; *Ogden v. Raymond*, 22 Conn. 379, 59 Am. Dec. 429; *State v. Dillon*, 32 Fla. 545, 22 L. R. A. 124; *McCormick v. Pratt*, 8 Utah 294, 30 Pac. 1091, 17 L. R. A. 243.

93. Public office and officer defined and illustrated. *Polk v. James*, 68 Ga. 128.

The position of harbor master created by legislative enactment,

and by city ordinance in accordance therewith, is a public office. *Gould v. Portland*, 96 Me. 125, 51 Atl. 820.

A legislative act creating a "water committee" to purchase water works for a city to issue bonds are not officers within the meaning of the Constitution. *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174.

"The mere change of the name of the officer does not affect the office itself." *Sullivan v. New York, etc.*, 53 N. Y. 652.

The word "office" refers to the functions performed, and not to the place where the services are rendered. *Stone v. United States*, 3 Ct. of Cl., 260.

Commissioners appointed to fund the floating debt of a city, held not officers. *People v. Middleton*, 28 Cal. 603.

Chief clerks, held not to be. *People v. Langdon*, 40 Mich. 673.

Chiefs of police are public officers under Ohio laws. *State v. Hall*, 25 Cir. Ct. R. 361.

An officer of a municipal corporation is a "public officer" within the meaning of a statute making certain delinquencies of such

manner of obtaining the place, as by election or appointment;<sup>94</sup> or, concerning removal or suspension;<sup>95</sup> or within the meaning of laws forbidding one from holding two offices at the same time;<sup>96</sup> or, touching compensation, salary, or emolument for services rendered or duties performed;<sup>97</sup> or, with respect to change of salary during

officers a misdemeanor. *People v. Bedell*, 2 Hill (N. Y.) 196.

Civil officers under special regulations. *Wood v. Quimby*, 20 R. I. 482, 488.

When speaker of house of representatives is not a public officer. *In re Speakership*, 15 Colo. 520, 11 L. R. A. 241, 25 Pac. 707.

Presidency of city council. *State ex rel. v. Küchli*, 53 Minn. 147, 19 L. R. A. 778, 54 N. W. 1069; *State v. Anderson*, 45 Ohio St. 196, 12 N. E. 656.

Officers of fire department are public officers in Maine. *Burrill v. Augusta*, 78 Me. 118.

94. **Appointment.** Members of water board, held officer as to appointment. *O'Brien v. Thorogood*, 162 Mass. 598, 39 N. E. 287.

The office of police judge, held to be a "civil office of profit under the state" within a constitutional provision relating to the appointment of members of the legislature to such offices. *Montgomery v. State ex rel.*, 107 Ala. 372, 18 So. 157.

95. **Removal, or suspension.** Veterinary surgeon of fire department, held officer, as to removal. *Wheeler v. New Orleans*, 46 La. Ann. 731, 15 So. 179.

Clerk of fire department, held

officer or employee, as to removal. *Van Alst. v. Jersey City*, 49 N. J. L. 156, 6 Atl. 883.

Policeman held not "public officer," within a statute relating to removal. *Commissioner v. Stokley*, 4 Pa. County Ct. Rep. 334.

96. **Holding two offices.** A member of a board of water commissioners held to be a "civil officer" within the meaning of the constitutional provision forbidding holding two offices at the same time. *State v. Valle*, 41 Mo. 29.

97. **Compensation or salary.** Medical superintendent of asylum, not "officer" as to recovering compensation for services. *Macdonald v. N. Y.*, 32 Hun (N. Y.) 89.

Held, a police surgeon not a clerk or employee respecting the regulation of compensation. *People v. Police Board*, 75 N. Y. 38, reversing 12 Hun (N. Y.) 653.

Harbor master, held public officer and not employee relating to compensation. *Goud v. Portland*, 96 Me. 125, 51 Atl. 820.

Watchman held to be an officer, and not an employee respecting the question of compensation. *Doolan v. Manitowoc*, 48 Wis. 312, 4 N. E. 475.

the term;<sup>98</sup> or, in determining the question of exemption of salaries of officers from judicial process.<sup>99</sup>

### § 424. Office distinguished from employment.

It is often necessary to determine whether the performance of certain services, or whether a particular position, is an office or a mere employment, or whether a given person is an officer or a mere employee, as for example, one selected to do specified work under contract provided by statute, charter, ordinance or otherwise.<sup>1</sup> Thus, state constitutions frequently provide that no person shall at the same time be a state officer and an officer of any municipality, and that no person shall at the same time fill two municipal offices either in the same or different municipalities.<sup>2</sup> Sometimes municipal charters forbid city officers from holding any state or federal office.<sup>3</sup>

98. **Change of salary during term.** Within meaning of constitution forbidding changing of salary of officer during term, clerks of police court and stenographer were held to be officers. *Louisville v. Wilson*, 99 Ky. 598, 36 S. W. 944.

Police held not "public officers," within meaning of a constitution against changing compensation during term by private or local bills. *Shanley v. Brooklyn*, 30 Hun (N. Y.) 396; *Morgan v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 795; *Russell v. Williamsport*, 9 Pa. County Ct. Rep. 129.

The tillerman of a ladder carriage in a city fire department at a fixed salary payable monthly and holding his position during good behavior is a public officer or employee forbidding increase of compensation. *Wright v. Hartford*, 50 Conn. 546.

A city engineer of a fire department appointed by the council and subject to removal at its pleasure, held not to be an officer within a law forbidding increase in salary during term. *State ex rel. v. Johnson*, 123 Mo. 43, 27 S. W. 399.

99. **Salary exempt from process.** The clerk of a recorder's court, whose position is created by the city charter is held to be an officer within the meaning a statute providing that money for the salary of an office shall be exempt from seizure. *Moll v. Sbisba*, 51 La. Ann. 290, 25 So. 141.

1. *Shelby v. Alcorn*, 36 Miss. 273, 276, 72 Am. Dec. 169.

2. Const. of Mo. 1875, art. IX, § 18.

3. Municipal Code of St. Louis (1901, McQuillin), p. 376, § 88.

Laws also exist restricting the salaries of city and town officers. And when offices are created municipal charters often provide that it shall be done by a prescribed vote of the legislative body, as two-thirds or three-fourths of the whole membership, while usually a majority vote is only necessary to pass a resolution or ordinance, providing for specified work or duties, as, for example, the construction of particular municipal buildings, or the doing of designated public work or improvements, as the construction or reconstruction of streets and sewers, or the superintending of the construction of water works, the compilation or revision of the city laws, etc.<sup>4</sup> The performance of the latter and like duties would not constitute an office, but a mere employment. "A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its object. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."<sup>5</sup> Therefore, an agreement, authorized by law, between the government and third parties, expressly stipulating and describing the duties and fixing the compensation, does not create an office.<sup>6</sup>

The officer having no vested rights in his office, may be deprived of the salary or emoluments pertaining thereto during his term by a transfer of his powers and duties or an abolition of his office, or his duties may be increased without creating a new office or providing additional compensation, whereas the municipal corporation cannot legally refuse to pay for services rendered by virtue of a valid contract, nor can it vary the terms of such contract by imposing increased duties, without the consent or acquiescence of the other party, for it is an estab-

4. *Ellsworth v. Rossiter*, 46 Kan. 237, 240, 241, 26 Pac. 674.

See chs. 13 and 16 *post*.

5. *United States v. Hartwell*, 6 Wall. (U. S.) 385, 393, 18 L. Ed. 830.

6. *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302.

See *Lawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *Bunn v. People*, 45 Ill. 397.

lished rule that a municipal corporation is bound by all its valid and authorized contracts in like manner as an individual or private corporation.

Another instance by way of distinction may be given. The laws usually prescribe certain general qualifications of all elected or appointed officers in addition to special qualifications in particular cases. One not possessing the named qualifications cannot legally act as a municipal officer, since the right to fill an office or serve the public in an official capacity is not a natural right but merely a civil right conferred by law, but one ineligible to hold office may properly enter into contract of employment with, or do work for, the city or town under contract.

Chief Justice Marshall said: "Although an office is an employment, it does not follow that every employment is an office. A man may be certainly employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rule prescribed by government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station, without any contract defining them, if these duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."<sup>7</sup>

Judge Cooley expresses the distinction thus: "*The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or non-*

7. United States v. Maurice, 2 Brock. 96, 102, 103, 30 Fed. Cas. 15, 247.

See Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169, and elabor-

ate notes, pp. 179-189; 63 Am. St. Rep. 181; Throop on Pub. Off., § 3 *et seq.*; Opinion of the Judges, 3 Me. 431.

feasance in office, and usually, though not necessarily, in the tenure of his position.”<sup>8</sup>

In particular cases other distinctions will appear, which are not general. Many cases illustrating the doctrine are contained in the notes.<sup>9</sup>

8. *Throop v. Langdon*, 40 Mich. 673, 682, 683, approved in *State ex rel. v. Shannon*, 133 Mo. 139, 164, 33 S. W. 1137; *State ex rel. v. Johnson*, 123 Mo. 43, 52, 27 S. W. 399, and *State ex rel. v. May*, 106 Mo. 488, 506, 17 S. W. 660; *Baltimore v. Lyman*, 92 Md. 591.

See *Collins v. Mayor of N. Y.*, 3 Hun (N. Y.) 680; *Worthy v. Barrett*, 63 N. C. 199; *People v. Pickney*, 32 N. Y. 377.

9. Officers distinguished from employees illustrated. A park commissioner does not discharge the duties of an officer, when. *Astor v. New York*, 62 N. Y. 567; *People v. McDonald*, 69 N. Y. 362.

Librarian of school district, held not to be public officer in particular case, but mere employee, although he had a contract for a year. *Bell v. New York*, 61 N. Y. S. 709, 46 App. Div. 195.

Superintendent of school in Baltimore is not a municipal officer within meaning of charter requiring him to be a registered voter, but is merely an employee of the board of education. *Baltimore v. Lyman*, 92 Md. 591, 48 Atl. 145.

Commissioners appointed for a particular act or purpose are not officers. *Sheboygan County v. Parker*, 3 Wall. (70 U. S.) 93; 18 L. Ed. 33; *People v. Nichols*, 52 N. Y. 478. As for example, special commissioners in street

opening proceedings. *McArthur v. Nelson*, 81 Ky. 67; *In re Hathaway*, 71 N. Y. 238.

Board of water commissioners under state law were properly held officers. *State v. Valle*, 41 Mo. 29; *Garnier v. St. Louis*, 37 Mo. 554.

When water commissioners are employees. *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174.

The members of the board of public improvements are public officers. *People v. Hurlbut*, 24 Mich. 14, 9 Am. Rep. 103.

Legislators. So are the members of the assembly. *State v. Anderson*, 45 Ohio St. 196, 12 N. E. 656; *State v. Boody*, 53 N. H. 610; *In re Newport Charter*, 14 R. I. 655; *Morril v. Haines*, 2 N. H. 246; *Hill v. Rayland*, 40 Miss. 619; *People v. Brooklyn*, 77 N. Y. 503.

Policemen. It has been held that each member of the police force holds an office. *State ex rel. v. Kennedy*, 69 Conn. 220, 37 Atl. 503. And that a policeman is a public officer. *Farrell v. Bridgeport*, 45 Conn. 191. See *Francis v. Blair*, 96 Mo. 515; *Carrington v. St. Louis*, 89 Mo. 208. But it has been held that police patrolmen are not. *Stabley v. Brooklyn*, 30 Hun (N. Y.) 396.

Firemen. In New York it has been held that firemen and officers of the fire department are

In a New Jersey case office is thus distinguished from employment. "In every definition given of the word 'office,' the *features recognized as characteristic*, and distinguishing it from a mere employment, are the *man-*

not public municipal officers, but only agents of the city. *People v. Pickney*, 32 N. Y. 377.

A like ruling has been made in Ohio. *State v. Jennings*, 57 Ohio St. 415, 63 Am. St. Rep. 723, 49 N. E. 404.

Mere watchmen are not officers. *Doyle v. Aldermeier*, 89 N. C. 133, 45 Am. Rep. 677.

Light trimmer. Neither is a person employed to trim lights for the city. *State v. Anderson*, 57 Ohio St. 429, 49 N. E. 406.

Electrical engineer. Nor is an engineer in the city's electrical department. *State v. Anderson*, 57 Ohio St. 429, 49 N. E. 406.

A city engineer, held to be a public officer and not a professional employee. *Gray v. Granger*, 17 R. I. 201, 21 Atl. 342.

Civil engineer employed by the day. A person appointed for no definite term to perform engineering duties in connection with sewers for a *per diem* wage is not an officer under a statute declaring the term officers to "include any person holding any situation under the city government or any of its departments, with an annual salary or for a definite term of office." *Weesner v. Central Nat. Bank*, 106 Mo. App. 668, 80 S. W. 319.

The clerk or secretary of a board of water works trustees of a municipality whose duties are

those of a subordinate is not an officer, but an employee. *Hutchinson v. Lima*, 27 Ohio Cir. Ct. R. 545.

Superintendent of water-works, held not an officer but employee. *Cramer v. Water Commissioners of New Brunswick*, 57 N. J. L. 478, 31 Atl. 384.

Street inspector held not an officer, but a mere employee. *Meyers v. New York*, 69 Hun (N. Y.) 291, 23 N. Y. Supp. 484.

Assistant secretary, held not an officer but an employee. *Jackson v. New York*, 87 Hun (N. Y.) 296, 34 N. Y. S. 346.

Janitor of court is employee, not officer, respecting compensation. *Sullivan v. N. Y.*, 48 How. Pr. (N. Y.) 238.

Excise inspector. *People v. Murray*, 5 App. Div. (N. Y.) 288, 39 N. Y. S. 227.

Chief clerk, of detective bureau, held to be an officer, not an employee because so classified by civil service commission. *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410.

Captain of boat. The St. Louis Court of Appeals held that one commissioned captain of the harbor boat, under ordinance, was not a city officer. *McCloy v. St. Louis*, 6 Mo. App. 603.

The superintendent of streets in Kansas City, who is appointed by the mayor, subject to confir-



*ner of appointment and the nature of the duties to be performed—whether the duties are such as pertain to the particular official designation and are continuing and permanent and not occasional or temporary.”*<sup>10</sup>

mation by the council, is an officer and not a mere employee. *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660, 506.

**School teachers** are employees and not officers, under laws authorizing the school board to appoint teachers on the nomination of the board of superintendents, and the position rests on contract. *Murphy v. Board of Education*, etc., 84 N. Y. S. 380, 87 App. Div. 277, affirming 78 N. Y. S. 248, 38 Misc. Rep. 706.

**Firemen.** In New York City firemen are held not employees within the labor laws. *People v. Sturges*, 175 N. Y. 470, 67 N. E. 1088, affirming 79 N. Y. S. 969, 78 App. Div. 460.

**Clerk.** Laws providing for an eight hour day for all employees performing manual labor for the city have been held not applicable to a clerk in the city collector's office. *May v. Chicago*, 222 Ill. 595, 78 N. E. 912, 124 Ill. App. 527.

An assistant city auditor who performs the duties of the auditor during his absence is a public officer and not an employee. *Attorney General v. Tillinghast*, 203 Mass. 539, 89 N. E. 1058.

**Employees illustrated.** Under particular laws the following held to be employees only.

Superintendent of public tele-

graph service. *Miller v. Warner*, 59 N. Y. 956, 42 N. Y. App. Div. 208.

Architect. *State v. Broome*, 61 N. J. L. 115, 38 Atl. 841.

Janitor at a City Hall. *Hart v. Newark* (N. J. Sup., 1910), 77 Atl. 1086.

Surveyor. *Wardlaw v. New York*, 61 N. Y. Super. Ct. 174, 19 N. Y. Supp. 6.

Public printer. *Brown v. Turner*, 70 N. C. 93.

Clerk. *Mohan v. Jackson*, 52 Ind. 599.

Teachers. *Seymour v. Over Road School*, 53 Conn. 502, 3 Atl. 552.

Notary. *State v. Castell*, 22 La. Ann. 15.

Inspector of building. *State v. Longfellow*, 93 Mo. App. 364, 67 S. W. 665.

See brief of counsel to *State ex rel. v. Jennings*, 57 Ohio St., pp. 418 to 422 for list of cases determined under various provisions defining officers, etc.

10. *Lewis v. Jersey City*, 51 N. J. L. 240, 242, 17 Atl. 112.

**Employee illustrated.** One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties

**§ 425. Assistant defined—illustrations.**

Some charters distinguish between an officer who may be the head of a department, or one in whom specific corporate powers are vested and an assistant or deputy, or clerk to some officer, as well as between an officer and a mere employee in a department. So distinction is sometimes made between a deputy or assistant and a clerk.<sup>11</sup>

“An assistant is one who stands by and helps or aids another. He is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction unless otherwise expressly provided by law.”<sup>12</sup> Thus, an act of congress provides for the appointment of an assistant secretary of the treasury “who shall perform all such duties in the office of the secretary of the treasury belonging to that department as shall be prescribed by the secretary of the treasury, or as may be required by law.” Under this law it has been held that the acts of the assistant are not valid unless specially authorized by law or prescribed by the secretary of the treasury.<sup>13</sup> So the commissioner of pensions, although in one sense an officer, being the head of a bureau, is in fact only an assistant in the interior department.<sup>14</sup>

Ordinarily, the assistant is one whose chief function is to perform such duties as may be designated from time to time by the officer under whom he serves, or which by custom of the office becomes the duties of the assistant (in which case directions for performance are

as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office. *Olmstead v. New York*, 42 N. Y. Super. Ct. Rep. 482; *Baltimore v. Lyman*, 92 Md. 591, 48 Atl. 145.

11. *Municipal Code of St. Louis* (1901, McQuillin), p. 378, § 91.

12. *United States v. Adams*, 24 Fed. 351.

13. *United States v. Adams*, 24 Fed. 351.

14. *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482.

presumed to have emanated from the officer),<sup>15</sup> or which may be prescribed by law. In a word, the assistant performs, in part, the duties and exercises, in part, the powers and may, in some instances, assume, in part, the responsibilities (though the responsibility is uniformly to the officer) with which the officer under the law is invested. In certain cases, in event of the absence, sickness or other disability of the officer, he may perform all of the duties and exercise all of the powers of such officer.<sup>16</sup> Sometimes he performs such duties, under his superior, as the law assigns to him.<sup>17</sup>

In determining whether or not a person is a civil officer it has been aptly said that "the mode of appointment is not material."<sup>18</sup> A *fortiori* should this rule apply in ascertaining whether a given person is an officer, or an assistant or deputy. Sometimes the assistant or deputy is appointed by the officer under whom he serves; sometimes by the mayor and confirmed by the council; sometimes by the mayor alone, and sometimes in other ways, and occasionally he is elected by the people.

It should be observed that the proper construction of the provisions of the particular charter often control what persons are assistants as distinguished from officers and other employees. Thus, some charters define an officer as a person in public station, (1) having "an annual salary," or (2) "a definite term of office," or (3) engaged, in some "relation in the collection and disbursement of the city's money."<sup>19</sup> Within the meaning of such

15. United States v. Adams, 24 Fed. Rep. 351.

16. Municipal Code of St. Louis (1901, McQuillin), p. 379, § 91.

17. Morgan v. Denver, 14 Colo. App. 147, 59 Pac. 619.

Power to appoint assistants and charge the city with pay of. Huron v. Campbell, 3 S. D. 309, 53 N. W. 182.

When words "officers" and "assistants" are synonymous, as employed in a statute, see Hawkins v. Newman, 4 M. & W. 613.

18. State ex rel. v. Valle, 41 Mo. 29, 32.

19. St. Louis Charter, art. XVI, §§ 17, 18, art. III, § 26, par. 8.

descriptions, if the person in question possesses any one of these three characteristics he is technically an officer, but if in his situation or employment he is merely aiding an officer, or transacting part of the duties imposed upon such officer by law, or even performing all of them temporarily, in event of such officer's absence, sickness or other inability, and not acting in an independent character, as by performing specific duties conferred upon the position occupied by him by charter or ordinance with no responsibility to another, but only to the people, then he would undoubtedly occupy the relation of assistant or deputy to an officer, and be, in fact, the assistant or deputy as contradistinguished from the officer.

An examination of the ordinances of certain municipal corporations will disclose the fact that the employee who is to all intents and purposes the assistant, as above defined and illustrated, is variously called "assistant," "deputy," "clerk," "subordinate," "employee," "chief mechanical engineer," "general superintendent," and "supervisor." Likewise, municipal charters employ various designations. For example, in the St. Louis charter those who, in contemplation, are to assist the several members of the board of public improvements are named "employees," "assistants and employees," "subordinates," "deputies and assistants." In the fire department, those who assist the chief are "officers and employees," according to the charter, and in the health department, all assistants are "employees."<sup>20</sup>

The word "associate" is sometimes applied to a mere assistant or subordinate. But no particular word or words, to designate the title of a public position, can change its essential character. Its nature must be determined from the relation of the particular situation to the office or department with which it is connected. If it

20. St. Louis Charter, art. IV, art. XI, § 1; art. XII, §§ 3 and 5; § 34; art. IV, § 42; art. VIII, § Municipal Code of St. Louis 2; art. VII, § 1; art. IX, § 2; (1901, McQuillin), p. 380.

is subordinate to, or under the direction and control of, such office or department, then the occupant thereof must be viewed as a mere assistant.

### § 426. Deputy defined—powers.

One authorized by an officer to exercise the office or rights which the officer possesses, for and in place of the latter, is generally said to be a deputy. "A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable."<sup>21</sup> Nor is a deputy equivalent to a mere assistant, in that the deputy, generally speaking, possesses all the powers of his principal.<sup>22</sup>

Usually the assistants of the sheriff, coroner, and marshal are designated as deputies, but municipal charters often speak of the assistants of other chief officers or heads of departments as deputies and assistants. Ordinances also refer to other assistants to chief officers as deputies. Charters and ordinances also designate deputies as first deputy, second deputy, etc. However, whether they are called assistants or deputies, unless they fall within the classification of officers, or within the classification of clerks, or are mere employees, they are, within the meaning of charter provisions, assistants. Ordinarily a deputy is spoken of as an officer as distin-

21. 9 Am. & Eng. Ency. of Law (2d Ed.), 369, adopted in *Carter v. Hornback*, 139 Mo. 238, 242, 243, 40 S. W. 893; *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70; *Willis v. Meloin*, 53 N. C. 62, 63; *People v. Baker*, 35 N. Y. S. 727, 729, 14 Misc. Rep. 360; *In re Tilyon*, 67 N. Y. S. 1097, 1104, 57 App. Div. 101, 110.

22. 9 Am. & Eng. Ency. of Law. (2d Ed.), 369.

Deputy distinguished from assistant. It has been said that an

assistant is a more comprehensive word than deputy and includes those who aid a principal, whether sworn or not sworn, while deputy embraces only the sworn class. *Ellison v. Stevens*, 22 Ky. (6 Mon.) 279, per Mills, J., dissenting.

An inspector of buildings being an assistant of the commissioner of buildings is not an officer. *State ex rel. v. Longfellow*, 95 Mo. App. 660, 69 S. W. 596.

guished from a mere employee, especially where his position is held by virtue of statute and where his duties are prescribed by law.<sup>23</sup> But the designation is otherwise where a special deputy is appointed for a particular purpose. He is then held to be the personal representative of the officer.<sup>24</sup>

In general, a deputy has power to do every act which his principal might do; but a deputy cannot make a deputy.<sup>25</sup> In the absence of any law providing for a deputy, courts cannot take judicial notice that the duties of a municipal officer are, or may be, performed by a deputy.<sup>26</sup> The general rule is that ministerial acts which are required by statute to be performed by a particular officer are valid if performed by the deputy of such officer. This has been held in respect to the taking of the acknowledgment of a deed,<sup>27</sup> and the signing of tax bills by a deputy collector.<sup>28</sup> The St. Louis court of appeals states, *obiter dictum*, that this principle should apply to an act of a comptroller with reference to countersigning special tax bills, but in that case plaintiff failed to prove the ordinance under which the deputy comptroller was alleged to have been appointed.<sup>29</sup> But where the deputy officer acts he can only act in the name of his principal.<sup>30</sup>

23. *Dayton v. Lynes*, 30 Conn. 351; *Eastman v. Curtis*, 4 Vt. 616; *White v. State*, 44 Ala. 409; *Towns v. Harris*, 13 Tex. 507; *Conwell v. Voorhies*, 13 Ohio 523.

24. *Cavanaugh v. State*, 41 Ala. 399.

25. See *Lewis v. Lewis*, 9 Mo. 183; *Steinke v. Graves*, 16 Utah 293, 52 Pac. 386, 387.

26. *Eyerma n v. Payne*, 28 Mo. App. 72.

27. *Gibbons v. Gentry*, 20 Mo. 468; 1 Devlin on Deeds, § 473.

28. *State ex rel. v. Miller*, 16 Mo. App. 539.

29. *Eyerma n v. Payne*, 28 Mo. App. 1. c. 78.

30. *Carter v. Hornback*, 139 Mo. 238, 242, 40 S. W. 893; *Samuels v. Shelton*, 48 Mo. 1. c. 450; *McClure v. Wells*, 46 Mo. 311; *Evans v. Wilder*, 7 Mo. 359; *Atwood v. Reyburn*, 5 Mo. 533.

Power to appoint deputy under particular charter. *Tower v. Welker*, 93 Mich. 332, 53 N. W. 527.

Meaning of "deputy" under particular law. *People v. Barker*, 35 N. Y. S. 727, 14 Misc. Rep. 360.

## § 427. Clerk defined.

Usually, "a mere clerk is not an officer. \* \* \* The title clerk is properly that of an employee."<sup>31</sup> But clerks are sometimes held to be officers, within the meaning of certain constitutional, statutory, charter and ordinance provisions.<sup>32</sup> It is clear that a clerk is referred to as an "officer" within the meaning of a provision preventing a person from drawing two salaries of two different officers or from holding two different places or offices.<sup>33</sup>

The chief official who keeps and has charge of court records is universally designated "clerk," and he may be considered an officer.<sup>34</sup> But the duties of the ordinary clerk are not specifically defined by law, or by custom of long standing; they may be changed at the will of the officer unless restrained by law; and the officer may transfer or distribute the work of his office or department as he may see fit. The fact that a clerk may be independent in so far as duration of term of office is concerned does not change his status. As suggested by Cooley, J., "There is nothing significant in this fact; a janitor may also be independent, but he would not be an officer."<sup>35</sup>

The word "clerk" or "clerks," as employed in municipal charters, ordinances and statutes usually refers to those persons whose duties are principally clerical, in which positions they are not required to exercise judgment and discretion with reference to official or departmental work. While they are required to use intelligence, judgment and discrimination, it is of that character

31. Per Cooley, J., in *Throop v. Langdon*, 40 Mich. 673, 684, 686; *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; *United States v. Smith*, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534.  
32. *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830; *United States v. Bloomgart*, 2 Ben. (U. S. D. C.) 356; *Vaughn v.*

*English*, 8 Cal. 39; *Collins v. Mayor*, 3 Hun (N. Y.) 680.

See note to *Shelby v. Alcorn*, 72 Am. Dec. 184, 185.

33. *Talbot v. United States*, 10 Ct. of Cl. 426.

34. See *ex parte Hennen*, 13 Peter (U. S.) 230, 10 L. Ed. 138.

35. *Throop v. Langdon*, 40 Mich. 673, 686.

which relates generally to clerical duties, as contradistinguished from those of an administrative or executive character. The term is generally so used and understood.

An "examiner of records" whose duties were to examine the public records of real estate transfers and make such abstracts of titles as the needs of the city government might require was held to be a clerk within the meaning of a charter provision declaring the term "clerks" to include those whose work was purely clerical, not involving any technical skill, and those requiring special knowledge.<sup>36</sup>

A property clerk of a police department was held not to be a "regular clerk" within the meaning of a charter providing for the removal of regular clerks.<sup>37</sup> A regular clerk is one whose duty is to keep records or accounts, or to do writing which relates to the ordinary conduct or business of the department.<sup>38</sup>

Where a law required a clerk of the fire department to be one of "the members and employees of said fire department," and a new charter declares that "the board may appoint a secretary who shall perform such duties as the board may prescribe," the secretary of the board under the new charter is not the same office as that of clerk under the old law.<sup>39</sup>

## § 428. Employees described.

A person who is engaged in the performance of the proper duties of an office is an "employee in the office,"

36. *Thompson v. Troup et al.*, 74 Conn. 121, 49 Atl. 907.

37. *People ex rel. Blatchford, v. McAdoo*, 181 N. Y. 548, 74 N. E. 1123, affirming 91 N. Y. 553, 101 App. Div. 183.

38. *People ex rel. Blatchford v. McAdoo*, 181 N. Y. 548, 74 N. E.

1123, affirming 91 N. Y. 553, 101 App. Div. 183.

39. *Maxwell v. Board of Fire Commissioners, etc.*, 139 Cal. 229 72 Pac. 996.

**Clerk.** One keeping records or accounts is, as used in charter—as to removal. *People v. N. Y. Fire Commissioners*, 73 N. Y. 437.



whether his particular duties are carried on within or without the walls of the building in which the chief officer generally transacts his business.<sup>40</sup> The word employee is more extensive than "clerk" or "officer," signifying any one in place, or having charge or using a function, as well as one in office.<sup>41</sup>

The employee of the city, other than an officer, assistant or deputy, clerk or day laborer, as contemplated by municipal charters, is variously referred to in ordinances as secretary, stenographer, inspector, janitor, porter, watchman, fireman, foreman, draughtsman, surveyor, civil engineer, rodman, fieldman, mechanical engineer, weigher, overseer, superintendent, machinist, or mechanic. Those who are employed in particular departments have many other designations indicative of the character of the services which they are supposed to render. Usually the authority to employ all such must be expressly conferred by ordinance, and their compensation must be fixed in like manner by the governing legislative body.

In a prior section the employee is distinguished from the officer, and various illustrations are also given.<sup>42</sup>

### § 429. Day laborers defined and illustrated.

Day laborers constitute a class of municipal employees which cannot be designated as officers, deputies or assistants, clerks, agents, etc. Ordinarily, those referred to as "employees," as mentioned in the last section, are not included within the term of day laborers, contemplated in municipal charters and ordinances. For example, the St. Louis charter draws a distinction by providing that the governing legislative body "shall establish the salaries of all officers and the compensation of all employees, except day laborers."<sup>43</sup>

40. *Stone v. United States*, 3 Ct. of Clms. Rep. 260.

41. *Stone v. United States*, 3 Ct. of Clms. Rep. 260.

42. § 424 *ante*.

43. *St. Louis Charter*, art. III, § 26, par. 8; *Municipal Code of St. Louis* (1901, McQuillin), p. 218.

"No doubt the term laborer in some extended senses will include every possible human exertion, mental or physical."<sup>44</sup> In its most comprehensive sense, the word "laborer" may be applied to a person who performs any labor or work of any character, either mental or physical, for all persons who earn compensation by labor or work of any kind, whether of the head or hands, including judges, lawyers, bankers, merchants, officers of corporations and all municipal officers and employees are in some sense "laborers." But, as ordinarily employed, in the English vocabulary, the word "laborer" or "day laborer" has a definite and precise meaning.

A laborer is popularly understood to be a person who performs manual labor, not requiring a special knowledge or skill.<sup>45</sup> It relates to one engaged in manual labor, "as distinguished from officers of the corporation, or professional men engaged in its service."<sup>46</sup> Labor is understood to be physical toil, and a laborer is one who subsists by physical toil,<sup>47</sup> or one who performs with his own hands the contract which he makes with his employer.<sup>48</sup>

A laborer is one who labors in a toilsome occupation; one who gains a livelihood by manual toil; one who depends on hand work, not head work, for a living.<sup>49</sup> He is "a man who does work that requires little skill as distinguished from an artisan, sometimes called a laboring man."<sup>50</sup> "A labourer is a man who digs and does

44. *Brockway v. Innes*, 39 Mich. 47, 48, per Campbell, C. J.

A laborer is one who works with body or mind, or both. *Century Dict. & Cyc.*, tit. "Laborer."

45. *Epps v. Epps*, 17 Ill. App. 196, 201.

46. *Coffin v. Reynolds*, 37 N. Y. 640.

47. *Weymouth v. Sanborn*, 43 N. H. 173.

Day labor is labor hired or performed by the day; stated fixed

labor. Day laborer is one who works by the day. *Century Dict. & Cyc.*, tit. "Day laborer."

48. *Wentroth's Appeal*, 82 Pa. St. 469.

49. *Pennsylvania R. Co. v. Leuffer*, 84 Pa. St. 168, 171; *In re Hocking*, 8 Sawyer 439, 440; *Blune v. Richards*, 2 Ohio St. 401.

50. *Webster's Dict.* quoted with approval in *Dano v. Mobile*, Ohio & R. R. Co., 27 Ark. 564, 567; *M., K. & T. Ry. v. Baker*, 14 Kan. 563.

other work of that kind with his hands. A carpenter or a baliff or a parish clerk is not called a labourer.”<sup>51</sup>

Popularly speaking, the term laborer is not applicable to any one who does not earn his living by the work of his hands.<sup>52</sup> The cases in the foot notes fully sustain this view.<sup>53</sup>

51. Per Brett, L. J., in *Morgan v. London Gen. O. Co.*, 53 L. J. Q. B. 353.

See Stroud's Judicial Dict., tit. "Labourer."

**Laborer defined.** Specifically a laborer is one who is engaged in some toilsome physical occupation; in a more restricted sense, one who performs work which requires little skill or special training, as distinguished from a skilled workman. Century Dict. & Cyc., tit. "Laborer."

52. *Caraker v. Matthews*, 25 Ga. 571, 576.

53. **Who are laborers illustrated.** As used in a statute relating to claims of laborers it was held to apply only to those who had performed manual labor, and not to members of the engineer corps, or the assistant general manager. *State v. Rusk*, 55 Wis. 465.

The following have been held not to be "laborers" within the meaning of various statutory provisions: A time-keeper and superintendent. *M., K. & T. Ry. Co. v. Baker*, 14 Kan. 563.

An architect. *Reader v. Bensberg*, 6 Mo. App. 445; *Price v. Kirk*, 90 Pa. St. 47. See *Bank v. Gries*, 35 Pa. St. 42.

An overseer of a plantation. *Whitaker v. Smith*, 81 N. C. 340.

An engineer. *State ex rel. v. Rusk*, 55 Wis. 465.

A consulting engineer. *Ericson v. Brown*, 38 Barb. (N. Y.) 390.

Assistant chief engineer of a railroad. *Brockway v. Innes*, 39 Mich. 47.

A traveling salesman. *Jones v. Avery*, 50 Mich. 326, although paid by the day. *Briscoe v. Montgomery*, 93 Ga. 602, 20 S. E. 40, 44 Am. St. Rep. 192.

An agent who sells goods by sample. *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495.

A hotel cook. *Sullivan's Appeal*, 77 Pa. St. 107.

A railroad conductor. *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90.

A boss or director of a department of a factory. *Kyle v. Montgomery*, 73 Ga. 337.

A contractor. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; *Aiken v. Wasson*, 24 N. Y. 482.

An agent employed to disburse money and pay off hands. *Edgar v. Salisbury*, 17 Mo. 271.

A bookkeeper and general manager. *Wakefield v. Fargo*, 90 N. Y. 213.

See further *Powell v. Eldred*, 39 Mich. 552; *Short v. Medberry*, 29 Hun (N. Y.) 29; *Dean v. De Wolf*, 16 Hun (N. Y.) 186; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463; *Bruise v. Griffith*, 34 Cal. 302; *Dove v. Numan*, 62 Cal. 399;

Ordinarily, municipal charters and ordinances use the word, not in its broad and general sense, but in its common and usual acceptation as a term to specify those whose services are manual or menial—those who are not responsible for independent action, but who do a day's work or stated job under the direction of a boss or superior.<sup>54</sup>

The assistants or deputies, clerks, subordinates and all other employees in the several municipal offices and departments are usually properly specified, with appropriate titles, designating the class, or character of service, each is expected to perform, while the laborers or day laborers are uniformly and properly mentioned as of the class described in this section.

It is a cardinal rule of construction that the word must be interpreted in the sense in which it is ordinarily used and understood, unless some other interpretation is clearly indicated by the charter.<sup>55</sup>

#### § 430. Power to create offices and situations, to fix salaries, etc.

Municipal charters contemplate official assistants or deputies and other subordinates and employees, but usually commit to the council or governing legislative body the exclusive authority to provide them as, in its legislative discretion, the demands of the several offices or de-

Blakey v. Blakey, 27 Mo. 39; note to Brown v. Hebard, 91 Am. Dec. 419, 421.

But it must be understood that the term laborer is always construed with reference to its use in the particular statute. Thus, a person hired by mine owners to oversee the miners and generally to control and direct its working and development, who in the performance of his duties, did some manual labor, was held to be entitled to a laborer's lien, etc.

Mining Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704.

So a clerk, Butler v. Clark, 46 Ga. 466; Claghorn v. Saussey, 51 Ga. 576, and a painter have been held to be laborers. Moore v. McCown, 64 Ga. 617.

54. Wakefield v. Fargo, 90 N. Y. 213; Kansas City to use v. McDonald, 80 Mo. App. 444, 448.

55. State ex rel. v. Rusk, 55 Wis. 465, 476; Wildner v. Ferguson, 42 Minn. 112, 18 Am. St. Rep. 495.

partments may require. In the enumeration of legislative power municipal charters often confer upon the legislative body express authority in general terms, "to regulate and provide for the appointment of city officers," but such instruments do not always specify what assistants, deputies and other subordinates shall be provided. However, charters usually show a clear intention to include all necessary subordinates in the municipal service, especially in those parts of the charter which relate to particular offices and departments, in which provision for the necessary assistants and subordinates is made.<sup>56</sup>

In the absence of an express charter provision empowering it to do so, it is generally held that a municipal council has not power to create offices or to pay salaries to incumbents thereof.<sup>57</sup>

56. § 361 *ante*, concerning implied power relating to offices and officers. St. Louis Charter, art. IV, § 45; Municipal Code of St. Louis (1901, McQuillin), p 242.

57. O'Connor v. Walsh, 82 N. Y. S. 499, 83 App. Div. 179; Lowery v. Lexington, 25 Ky. Law Rep. 392, 75 S. W. 202.

**Power to create offices—illustrations.** An ordinance creating a city paymaster whose duties are simply by way of assistance to the city register, is not invalid as creating a new office. *Henniger v. Memphis*, 120 Tenn. 555, 111 S. W. 1115.

Under the Kentucky statutes, the general council of cities of the second class has power to create the office of market master, and to prescribe his duties and salary. *Potter v. Bell*, 30 Ky. L. Rep. 1314, 101 S. W. 297.

Under a statute, which is also a part of city charter providing that all offices theretofore created,

not therein provided for, shall be abolished, but that the council shall have power to re-create such of said offices by ordinance, as may be needed for corporate purposes, the city may create only such offices as were theretofore in existence, but is not limited to such offices in the employment of mere clerks and employees. *Lowry v. Lexington*, 24 Ky. L. Rep. 510, 68 S. W. 1109.

A city clerk has power to create the office of deputy clerk under a statute which is also a part of charter providing that the city, "in person or by deputy" shall attend all meetings of the city council. *Lowry v. Lexington*, 24 Ky. L. Rep. 516, 68 S. W. 1109.

"The legislature has power to establish by appointment of the state executive, boards of police commissioners who should have control over local police matters including the appointment of police officers and the determination of the amount of their compensa-

Where the power to create situations in the municipal service, and to fix salaries, etc., is vested in the legislative body, the officer possesses no constitutional or charter prerogative to appoint subordinates independently of the legislation of the governing body, and by all authorized legislation relating thereto, he must be governed, not only in making appointments, but in all that is incident to the exercise of the power.<sup>58</sup>

However, the legislative power to provide situations under the municipal government, to create new offices and fix salaries does not always of itself include the power to appoint,<sup>59</sup> but under some charters, e. g., St. Louis, the power of appointment is an exclusive prerogative of the mayor in case of an officer, and of the officer or head of a department in case of an assistant or subordinate. This results from express charter provisions, and is an exception to the rule sometimes laid down that where an office is of legislative creation the legislature can modify, control, or abolish it. and within these powers, is embraced the right to change the mode of appointment to the office.<sup>60</sup>

tion." *Wiggin v. Manchester*, 72 N. H. 576, 58 Atl. 522; *Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100.

The Illinois civil service act does not purport to deprive or confer on a municipality the power to create or abolish offices. *Chicago v. People*, 114 Ill. App. 145.

In New York, in order to constitute a subordinate, appointed by a commissioner of public works pursuant to authority of the board of estimate and apportionment, a municipal officer, there must be a certain and definite intention manifested by such board to create

a permanent salaried office. *Grieb v. Syracuse*, 87 N. Y. S. 1083, 94 App. Div. 133.

Exercise of power to create office to be by ordinance, see ch. 13 *post*.

58. See *U. S. v. Perkins*, 116 U. S. 483, 6 Sup. Ct. 449, 29 L. Ed. 700, affirming 20 Ct. of Cl. 438; *U. S. v. Maurice*, 2 Brock. (U. S.) 96.

59. *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *Evansville v. State*, 118 Ind. 426; *State v. Kennon*, 7 Ohio St. 546.

60. *Davis v. State*, 7 Md. 151, 21 Am. Dec. 331.

### § 431. Same—cannot be delegated.

Under state constitutions the power to make laws, conferred upon the legislature, may not be delegated to the people of the state or any portion of them.<sup>61</sup> The only apparent exception is the power in this respect possessed by the municipal corporation. In legal language, this authority is said to be delegated by the state.<sup>62</sup> By virtue of municipal charters and general maxims applicable to municipal administration, the prohibition against delegation of power applies to the several departments and officers of the municipality, as stated, and illustrated elsewhere.<sup>63</sup> It thus follows that when an ordinance, or legislative act leaves the council or governing legislative body, to be valid, it must be complete.<sup>64</sup> On the question of the expediency of the particular ordinance, the council must exercise its own judgment definitely and finally. Where the law is made to take effect on the occurrence of some specified event, which would not of itself render it invalid,<sup>65</sup> this body must declare it expedient if that event

61. *Ex parte Wall*, 48 Cal. 279, 313, §§ 384 to 386 *ante*.

62. *Lammert v. Lidwell*, 62 Mo. 188; *State ex rel. v. Pond*, 93 Mo. 606, 6 S. W. 469; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1; *State v. Patrick*, 65 Mo. App. 653; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Cooley's Const. Lim.* (5th Ed.), 139, 140.

63. § 382 *et seq. ante*.

64. *Lammert v. Lidwell*, 62 Mo. 188; *O'Neill v. Ins. Co.*, 166 Pa. St. 72, 77, 30 Atl. 943; *Ex parte Wall*, 48 Cal. 279; *St. Louis v. Clemens*, 52 Mo. 133; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *St. Louis v. Howard*, 119 Mo. 41, 24 S. W. 770, 41 Am. St. Rep. 630.

65. The legislature may pass a law to take effect or go into op-

eration upon the happening of a future event or contingency. *St. Louis v. Alexander*, 23 Mo. 483; *State v. Winkelmeier*, 35 Mo. 103; *State ex rel. v. St. Joseph*, 37 Mo. 270; *State v. Binder*, 38 Mo. 451; *State ex rel. v. Wilcox*, 45 Mo. 458; *Township Organization Act*, 55 Mo. 295; *State ex rel. v. Pond*, 93 Mo. 606, 6 S. W. 469; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State v. Moore*, 107 Mo. 78; *State v. Dugan*, 110 Mo. 138, 19 S. W. 195; *Commonwealth v. 411Weller*, 14 Bush 218 (Ky.), 29 Am. Rep. 407, 411; *Locke's Appeal*, 72 Pa. St. 491; *Smith v. McCarthy*, 56 Pa. St. 359; *Commonwealth v. Painter*, 10 Pa. St. 214; *State v. Parker*, 26 Vt. 357; *Cooley's Const. Lim.* 117.

See §§ 212, 213 *ante*.

shall happen, but inexpedient if the event shall not happen. The members can appeal to no other man or men to judge for them in relation to its present or future propriety, or necessity, but they must exercise that power themselves, and thus perform the duty imposed upon them by the charter.<sup>66</sup>

Therefore, under the usual municipal charter the principle may be deduced that every office, and ordinarily, every situation under the city government or its departments, except where the charter or legislative act applicable creates the office, shall be established by ordinance.<sup>67</sup> The creation of an office or position which must continue to exist until abolished by ordinance can only be accomplished by the exercise of a power essentially legislative—a power which the municipal council alone possesses, under the charter, which cannot be delegated. It has been laid down that “the legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number—offices which the power creating them is incompetent to abolish.”<sup>68</sup> But certain subordinates or employees, as day laborers, are not included,<sup>69</sup> and this class of employees is usually the only exception. The fact that the ordinance confers authority upon the officer to appoint such additional help, “as may be required for the efficient working of his department,”<sup>70</sup> or “as may be necessary,”<sup>71</sup> where the character of such help is specified by naming in terms the positions, and designating the compensation for each situation, does not constitute a delegation of legislative power. In such case the ordinance itself creates the situation under the city

66. See *Barto v. Himrod*, 8 N. Y. 483, 490.

67. *State v. Kennon*, 7 Ohio St. 546.

68. *Ford v. Harbor Com'r*, 84 Cal. 19, 37.

69. The assembly must fix the compensation of all officers and employees, “excepting day labor-

ers.” *St. Louis Charter*, art. III, § 26; par. 8.

70. *St. Louis Mun. Code* (1901, McQuillin), § 1834.

71. *St. Louis Mun. Code* (1901, McQuillin), § 1829, salaries provided by § 1885; §§ 1838, 1842, 1845, 1901.



government or its departments, and whether it be technically an office or a mere place, the officer by filling it simply supplies an incumbent or person (as in his judgment the demands of the public service may require) for a position already created by legal authority.<sup>72</sup> An office or position may exist without an incumbent.<sup>73</sup>

72. See *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524.

73. *People v. Stratton*, 28 Cal. 382.

**Not delegation of legislative power.** An act conferring on county commissioners the power to authorize the employment of additional help in certain offices does not constitute a delegation of legislative power. *Nelson v. Troy*, 11 Wash. 435, 6 Amer. & Eng. Ency. of Law (2d Ed.), 1030.

So, a statute conferring on the attorney general the authority to appoint some reputable attorney for the performance of certain duties appertaining to the office of the attorney general, with like effect as if done by the officer, does not confer the power to create a new office. *State v. Becker*, 3 S. D. 29; 6 Amer. & Eng. Ency. of Law (2d Ed.) 1031.

So, a statute which provides that whenever the county attorney of any county shall be unable or shall neglect or refuse, to enforce the provisions of certain laws in his county, the attorney-general "may appoint as many assistants as he shall see fit," to enforce such laws, has been sustained. *In re Gilson*, 34 Kan. 641, 9 Pac. 763.

Under Acts 1898, ch. 123, § 95, of Maryland, relating to patrol-

men for city parks, the park commissioners held not authorized to compel the police commissioners to detail a designated number of men for park service for a whole year, with an additional number during the summer months. *Upshur v. City of Baltimore*, 94 Md. 743, 51 Atl. 953.

Fixing and allowing a monthly salary for a police surgeon regularly employed, as the law requires, does not create an office. *Cain v. Warner*, 60 N. Y. S. 769, 45 App. Div. 450.

Law authorizing increase of police to such additional force as extraordinary emergencies may require is held to limit the permanent force to the number specified in the law and is not a delegation of power to appoint permanent policemen *ad libitum*. *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524.

A charter provision and ordinances providing for the appointment of a board of appraisers composed of two aldermen and one citizen do not create a new office within the meaning of the Constitution prohibiting officers from holding more than one office at the same time. *Houston v. Stewart*, 96 Tex. 67, 87 S. W. 663.

A statute providing for a detective bureau and declaring that policemen previously appointed

The power to fix salaries cannot be delegated to officers.<sup>74</sup>

### 3. MUNICIPAL DEPARTMENTS, BOARDS, OFFICERS, COMMISSIONERS, ETC.

#### § 432. Forms of municipal organization widely vary— authority to create and abolish offices and departments.

What offices, departments, boards, commissions, etc., exist and what may be created and what may be abolished, and what authority may create and abolish, of course, must depend on the particular charter and the state laws applicable. Departments of fire, police, health, public works, parks, water, lighting, street, sewer, harbor and wharf, docks, education, charities and correction associated with the municipal government are common. Some of these, and in a few instances, all are made departments of the state government and the officers and agents thereof state officers or agents, performing state functions within the geographical area of the municipal corporation. The territory of the local corporation may comprise a part of a district constituting a police district.<sup>75</sup>

As heretofore pointed out, in the absence of constitutional provisions restricting the power of the state legislature, the form of the municipal organization and the manner in which the municipal powers shall be distributed and what departments and officers shall execute and administer them are matters wholly within the discretion of the legislature.<sup>76</sup>

or assigned to duty therein shall be known as detective sergeants, does not create a new position or office, and is not unconstitutional. *Snyden v. Partridge*, 174 N. Y. S. 87, 66 N. E. 655, reversing 80 N. Y. S. 1149, 78 App. Div. 644.

74. *Com. v. Addams*, 95 Ky. 588, 26 S. W. 581; *Smith v. Strothers*, 68 Cal. 194, 8 Pac. 854.

75. *People v. Draper*, 15 N. Y. 532, affirming 25 Barb. (N. Y.) 344.

76. § 165 *ante*.

Where the department, as for example, a fire, police, health, education, overseers of the poor, etc., is a corporation, or a *quasi*-corporation, with functions peculiar to such bodies which are performed separately from the functions of the municipality these bodies are responsible as corporations and may sue and be sued as such,<sup>77</sup> e. g., overseers of the poor;<sup>78</sup> but if the board or department is not a corporate body, of course, it cannot be sued as such, e. g., police board,<sup>79</sup> or board of park commissioners.<sup>80</sup>

As stated, whether or not a municipal corporation has power to create offices and departments, boards, commissions, etc., and change and abolish them, depends chiefly upon the provisions of its charter and legislative acts applicable. Under the power to preserve the health, etc., it has been held that a city has the undoubted right to create a board of health and appoint members thereof and subordinates.<sup>81</sup> But charter power to grant, hold and receive property and to lease, sell and dispose of the same for the benefit of the city or town is no authority for the creation of a sinking fund commissioner, being a new department of the municipal government.<sup>82</sup> The state may confer power to create a board of examiners to prescribe a systematic method for ascertaining the fitness of the applicant for municipal position.<sup>83</sup> Without authority, either expressed or implied, it is usually held that new bureaus in municipal departments cannot be created.<sup>84</sup>

77. *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679.

Status of municipal department or board as corporation—see *Scott v. Saratoga Springs*, 199 N. Y. 178, 92 N. E. 393.

78. *Overseers of the Poor of Boston v. Sears*, 22 Pick. (39 Mass.) 122.

79. *Brotherton v. Police Commissioners of Baltimore*, 49 Md. 495,

80. *Rauh v. Department of Public Park Comrs.*, 66 How. Pr. (N. Y.) 368.

81. *Boehm v. Baltimore*, 61 Md. 259.

82. *Smith v. Morse*, 2 Cal. 524.

83. *Newcomb v. Indianapolis*, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732.

84. *People v. New York Fire Comr's*, 23 Hun (N. Y.) 317, affirmed in 86 N. Y. 149.

Under some laws boards and departments may be abolished.<sup>84a</sup> Thus an authorized ordinance reorganizing the police department and vesting the entire control of the police force in a city marshal has the effect of abolishing the police board.<sup>85</sup> And by virtue of ample power a department may be abolished, although the terms of office of its officers have not expired.<sup>86</sup> Thus some charters confer power in express terms on the council or legislative body, by a two-thirds or three-fourths vote, to transfer and distribute the powers and duties, in whole or in part, of any office or department, to another, or others, and in such case the performance of the powers and duties added to those of any office or department shall not entitle its officers to additional compensation; and in event the entire powers and duties of an office or department shall be so transferred and distributed, the compensation of the office or officers and subordinates thereof shall cease, and the office or department shall be abolished.<sup>87</sup>

### § 433. The mayor, his term, functions and powers.

The chief officer, or executive and administrative head of a municipal corporation, in this country and in England, is usually styled the mayor.<sup>88</sup> Frequently, in the United States, the chief executive and administrative

84a. *Com. v. Reese*, 16 Ky. L. Rep. 493, 29 S. W. 352; *Butcher v. Camden*, 29 N. J. Eq. 478; *Toledo v. Lake Shore, etc. R. Co.*, 4 Ohio Cir. Ct. 113, 2 Ohio Cir. Dec. 450.

85. *Sheridan v. Calvin*, 78 Ill. 237.

86. *Butcher v. Camden*, 29 N. J. Eq. 478.

87. *St. Louis Charter*, art. III, § 32; *Municipal Code of St. Louis* (1901, McQuillin), p. 225.

88. *Burch v. Hardwick*, 23 Gratt. (Va.) 51.

Under *Pub. Stat. of New Jersey*, ch. 46, § 3, the mayor is mentioned as "principal officer" and the "chief executive" of the city.

"The mayor shall be the chief executive officer of the city." *St. Louis Charter*, art. IV, § 15; *Municipal Code of St. Louis* (1901, McQuillin), p. 233.

officer of a village is termed president.<sup>89</sup> In towns in Alabama he is called the intendant.<sup>90</sup>

In England the title of "Lord Mayor" may be conferred by letters patent from the Crown upon the chief magistrate of a city, but in the absence of such a grant he is called mayor. In 1910 there were lord mayors in twelve English and Welch cities: London, York, Leeds, Liverpool, Manchester, Birmingham, Bradford, Sheffield, Bristol, Cardiff, New Castle-upon-Tyne, and Norwich.<sup>91</sup>

Lord Mayor is also the title in Dublin in Ireland, while "Prevost" is given in Scotland.<sup>92</sup> The corresponding officer is known as *Maire* in France,<sup>93</sup> Burgomaster in Germany, in the Netherlands and other Teutonic countries,<sup>94</sup> Syndic or Sindaca, in Italy, and Alcalde in Spain, Mexico and the Spanish American countries. The office of mayor has existed for many centuries.<sup>95</sup>

89. State ex rel. v. Badger, 90 Mo. App. 183; State ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Kriseler v. Le Valley, 122 Mich. 576, 81 N. W. 580.

90. Civil Code, Ala., 1896, § 2942.

91. Arnold's Mun. Corp. (5th Ed., London), p. 9.

92. § 83 *ante*.

93. § 77 *ante*.

94. §§ 73, 74, 75 and 79 *ante*.

Burgomaster (or borough-master, also *burghmaster*, or *burgomaster*) a word of Teutonic origin, is the proper designation of the chief magistrate of a municipal town in the Netherlands, Germany, and other Teutonic countries, nearly corresponding to mayor in England and the United States.

95. Historical. "The mayor has the longest pedigree of any of our American officers. As far back as the sixth century we hear of the mayors of the palace in

the Frankish kingdoms, the last of whom, Karl Martel, was the grandfather of the Emperor Charlemagne. A few centuries later the name appears again both in France and England as the chief officer of a city, and in that capacity it has come down to our own time." Fairlie, *Essays on Municipal Administration*, p. 20.

The first historical appearance of the office of mayor is in London where the recognition of the *communa* by the national council in 1191 is immediately followed by the mention of Henry Fitz-Alwyn as mayor. Stubbs *Const.*, Hist., § 485.

In England in the 14th century the mayor was sometimes styled the "sovereign" and was given many prerogatives. Great respect was paid to the "ancients"—those who had already held municipal office. 4 *Encyc. Britannica* (11th Ed.), tit. "Borough," p. 271.

In this country, generally the mayor is elected by the qualified voters of the locality.<sup>96</sup> In New York the mayors were appointed by the governor in council until 1821.<sup>97</sup> In England and in most of the countries of Continental Europe the mayor is elected by the council or governing legislative body. However, in some European states he is appointed by the central government, as in Belgium, Denmark, Norway, Sweden, Holland and in certain towns in Italy and Spain.<sup>98</sup> In Germany the central government must approve the appointments of burgomasters.<sup>99</sup>

In this country the term of the mayor varies from one to five years. In some of the New England cities his term was one year only, while in many of the larger cities the term is four years, as in Buffalo, Chicago, Greater New York, Louisville, New Orleans, Philadelphia, and St. Louis. Usually the mayor is elected for two years, as in Atlanta, Cleveland, Detroit, Indianapolis, Milwaukee, Minneapolis, Los Angeles and San Francisco. The mayor is chosen annually in England.<sup>1</sup> In Germany

96. *Kirkham v. Russell*, 76 Va. 556, 958.

97. In New Jersey the mayor and other local officers were appointed by the central authority. § 189, Note 75 *ante*.

98. Shaw, *Municipal Government in Continental Europe*, pp. 225, 238, 253; Fairlie, *Municipal Administration*, ch. XIX, p. 411 *et seq.*; Goodnow, *Municipal Government*, ch. XI, p. 209 *et seq.*

99. Munro, *The Government of European Cities*, ch. 2, p. 187; Goodnow, *Comparative Administrative Law*, vol. 1, p. 333.

**Appointment of mayors.** In the monarchical states burgomasters were often named by the central government for long periods, as were the *maires* in France. The German governments usually re-

tain the right to confirm or reject the elected burgomaster. *Century Dict. & Cyc.*, tit. "Burgomaster."

Such centralization of power was never favored in this country. But in New York at first the mayor of New York city was appointed by the governor of the state. Also in New Jersey it seems that some mayors were appointed by the central authority. Note 75 to § 189 *ante*.

Act allowing governor to appoint temporarily the chief executive, known as recorder, to hold for a certain period, has been held not unconstitutional. *Com. v. Mair*, 199 Pa. St. 534, 53 L. R. A. 337, 49 Atl. 351, 46 Pittsb. Leg. J. 385.

1. 45 and 46 Vict. c. 50, § 15.

the term is long, sometimes for twelve years or for life. In France the term is four years.

In a few places the mayor is subject to removal by the governor of the state, as in Michigan and New York.<sup>2</sup>

The chief duty of the mayor is to enforce all the local laws and regulations,<sup>3</sup> and sometimes he is the presiding officer of the council or governing legislative body. He is a member of the council only when so made by the charter or legislative act applicable.<sup>4</sup> And when this is the case it is to the extent of such powers as are specially committed to him, and no further, that he is part of the council.<sup>5</sup>

The powers and duties of the mayor depend entirely upon the provisions of the charter of the corporation and valid ordinances or by-laws and resolutions of the council passed in pursuance thereof.<sup>6</sup> He has no authority, except what is expressly or impliedly conferred upon him by the charter, or by the council or governing legislative body acting within the scope of the law.<sup>7</sup>

2. Howell's Annotated Statutes of Michigan, § 653; Charter of Greater New York, § 122.

3. The mayor is the chief executive officer of the city, and as such it is his duty to see to the execution of all valid ordinances, resolutions and votes of the legislative body whether, as a matter of opinion or sentiment, the same meet with his approval *State ex rel. v. Martin*, 27 Neb. 441, 43 N. W. 244.

4. *Cochran v. McCleary*, 22 Iowa 75.

In England and in Germany he is the presiding officer.

5. *Brown v. Foster*, 88 Me. 49, 33 Atl. 662, 31 L. R. A. 116; *People ex rel. v. Ransam*, 56 Barb. (N. Y.) 514, 516; *Nulls v. Gleason*, 11 Wis. 470, 476, 78 Am. Dec. 721;

*State ex rel. v. Porter*, 113 Ind. 79, 14 N. E. 883.

6. *Galveston v. Hutches* (Tex. Civ. App. 1903), 76 S. W. 214.

7. *Union Depot Ry. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329; *Fletcher v. Collins*, 111 Ga. 253, 36 S. E. 646; *Bigby v. Tyler*, 44 Tex. 351.

**Authority of mayor—illustrations.** In the absence of any general or special action by the council authorizing him to do so a mayor has no power to call an election under the Code of Alaska which provides that the council shall have power "to make rules for all municipal elections." *Bates v. Nome*, 1 Alaska 208.

The mayor, not being a member of the water and light board, has no power to cancel or rescind a

The mayor as chief executive officer of the city is generally given power to supervise the other municipal officers in the performance of their official functions.<sup>8</sup> In this country, the powers and duties of the mayor are usually executive and administrative, sometimes, however, they may be judicial and legislative, depending, of course, on the law applicable.<sup>9</sup> When the mayor is called upon to exercise discretion and judgment, he is more than a mere administrative officer, as for example, where he is given the power to suspend or remove officers.<sup>10</sup>

In recent years the powers of the mayor have been greatly increased, as for example, his power, more or less unrestrained in the appointment and removal of municipal officers.

In many places, the mayor is a member of the police board, as in Buffalo, Cincinnati and St. Louis. In this relation he may serve the state in the enforcement of

contract made by such board within the scope of its authority. *American Electric Co. v. Waseca*, 102 Minn. 329, 113 N. W. 899.

May take affidavit only when duly authorized. *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193.

The authority of the legislature to grant powers to general officers of municipal corporations is limited by state constitution. *State v. Pender*, 66 N. C. 313.

A resolution authorizing the mayor to "make deed" does not authorize him to make a warranty deed. *Galveston v. Hutches* (Tex. Civ. App. 1903), 76 S. W. 214.

Where an act provided for the appointment by the board of an acting mayor in the absence or inability of the mayor, an assessment for street improvements is not void in the absence of other

evidence on the subject, merely because the warrant therefor was signed by one of the supervisors as "acting mayor." *City St. Imp. Co. v. Rontel*, 140 Cal. 55, 73 Pac. 729.

The fact that the mayor joined with the head of the fire department in promulgating rules for such department does not invalidate such rules under a statute requiring the head of the department to fix and promulgate such rules. *State v. Hyman*, 22 Ohio Cir. Ct. R. 213, 12 O. C. D. 265.

8. *Burch v. Hardwicke*, 23 Grat. (Va.) 51.

9. *Martindale v. Palmer*, 52 Ind. 411, 413; *Jacobs v. San Francisco*, 100 Cal. 121, 135, 34 Pac. 630.

10. *State ex rel. v. Rose*, 140 Wis. 360, 122 N. W. 751.



the central authority. In many other ways he often acts as an agent of the state in the execution of its laws.

In Great Britain the position of the mayor is chiefly honorary; his legal powers are limited. He has no veto power, and his administrative and executive power arises by virtue of the fact that he is a member of the council.

The chief executives of the cities of France, Germany and the countries of Continental Europe generally possess great powers. In Germany he is a real public administrator of local affairs.<sup>11</sup>

In this country, especially in the smaller cities and towns, the mayor is usually a magistrate *ex officio*.<sup>12</sup> But in the larger cities the mayor rarely performs judicial functions of this character. However, his func-

11. "The office of *burgermeister*, is a very old one, for the German free cities had such officials as early as the thirteenth century at least. During the later mediaeval period the *Burgermeister* exercised a general oversight in civic affairs, especially in those connected with taxation and expenditure, and continued to do so down into the nineteenth century, when in the Stein reorganization of 1808 the office was put upon a somewhat different footing. The Code of 1853 defined the place and powers of the *Burgermeister* in terms that were not altogether explicit; but during the last half century a large number of decrees of the higher authorities and decisions of the administrative courts have served to give the jurisdiction of the office a fair degree of definiteness. During this period the powers of the *Burgermeister* have been slightly increased, but only slightly; for it has apparently not been the aim of the higher authorities to use this official rather

than the *Magistrat* as the local agent of central administration, nor has it been their policy, as it has been that of American cities, to seek greater administrative efficiency by localizing greater responsibility in a single hand." *Monro, The Government of European Cities*, ch. 2, pp. 184, 185.

"American mayors occupy an intermediate position between the purely honorary and social dignity of the English officer and the professional public administrator of Germany, with a tendency in recent years to confer on the officer legal powers in some respects analogous to those of a mayor in France." *Dr. Fairlie, Essays on Mun. Adm.*, p. 20.

**Salaries of mayors:** Greater New York, \$15,000; Philadelphia, \$12,000; Chicago, \$7,000; St. Louis, \$5,000; Boston, \$10,000; New Orleans, \$6,000; Baltimore, \$5,000; Denver, \$5,000; San Francisco, \$2,500; Pittsburg, \$7,000.

12. *Hagerstown v. Dechert*, 32 Md. 369.

tions in these particulars depend entirely on the laws regulating the office.<sup>13</sup>

In England during his term of office and for one year thereafter the mayor is a justice of the peace, which in that country is an office of some dignity and social distinction; however, generally speaking, it is quite different in America.<sup>14</sup>

Where judicial powers are conferred upon the mayor, they may be exercised only in strict conformity to the law.<sup>15</sup> Under some charters mayors have the same jurisdiction as justices of the peace.<sup>16</sup> In Alabama the chief executive officer of a town—the intendant—has the power and jurisdiction of a justice of the peace in all matters civil and criminal arising within the corporation.<sup>17</sup>

Unless expressly conferred, the mayor has no power to try civil cases.<sup>18</sup>

Without express legal provision the jurisdiction of a mayor does not extend beyond the limits of the corporation.<sup>19</sup>

In the absence of the mayor, or head officers of the local corporation, other municipal officers are usually

13. *Breesman v. Peoria*, 16 Ill. 484.

14. **The mayor in England.** "The Town Council elects, annually in November, a mayor who holds office for one year; re-elections are frequent in the small boroughs, but not in the larger. The mayor, who is unpaid, is usually chosen from amongst the aldermen or councillors; but he may be elected from outside their ranks, and may be absolutely inexperienced in municipal affairs. He presides over the council meetings, and is generally an *ex officio* member of all committees; he is *ex officio* chairman of the borough bench of magistrates, where there is a separate commis-

sion of the peace; and he represents the municipality at all public ceremonies. He may be a mere figure-head; in any case his influence and authority depend solely upon his own personal character and energy, and not upon any powers attached to his office." Ashley, *Local and Central Government*, ch. 1, § 3, p. 39.

15. *Edina v. Brown*, 19 Mo. App. 672.

16. *Robinson v. Benton County*, 49 Ark. 49, 4 S. W. 195.

17. *Civil Code, Ala.*, 1896, § 2951.

18. *Smith v. Deweese*, 41 Tex. 594.

19. *Ex parte Deane*, 2 Cranch. (C. C.) 125, 7 Fed. Cas. No. 3712.

authorized to act in his stead, as for example, the president of the council or governing legislative body,<sup>20</sup> or the speaker of the lower house, where two houses exist, in case of the absence or disability of the president of the council or upper house.<sup>21</sup> In such case, in the absence of legal restriction, the officer authorized to act for the time being usually possesses all of the functions of the mayor.<sup>22</sup>

**§ 434. The department of public works, or the department of public improvements.**

The agency to provide for the public improvements of the local community is usually a department of the municipal corporation.<sup>23</sup> If the officers thereof are municipal officers, ordinarily, as mentioned elsewhere, they can-

20. *Mark v. West Troy*, 69 Hun (N. Y.) 442, 23 N. Y. S. 422.

Sometimes the chairman of a council is authorized to perform the duties of mayor during a vacancy in the office. *State v. Buffalo*, 2 Hill (N. Y.) 434.

Where head officer may act as mayor. *Chesapeake & O. Ry. Co. v. Maysville*, 24 Ky. Law Rep. 615, 69 S. W. 728.

21. *St. Louis Charter* (1876), art. IV, § 17.

22. *City Street Imp. Co. v. Rontet*, 140 Cal. 55, 73 Pac. 729; *North v. Cary*, 4 Thomp. & C. (N. Y.) 357; *State v. Byrne*, 98 Wis. 16, 73 N. W. 320.

**Powers of acting mayor.** Where, in absence, etc., of the mayor, the charter vests the power of the mayoralty in specified officer, such officer may legally proclaim an election if such power is given the mayor. *In re Cleveland*, 51 N. J. L. 319, 18 Atl. 67, 52 N. J. L. 188, 19 Atl. 17. 7 L. R. A. 431.

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A mayor *pro tem* is authorized by statute to issue warrants in criminal cases. *State v. Thomas*, 141 N. C. 791, 53 S. E. 522.

A president *pro tem* of a village as acting mayor has no jurisdiction to hear and determine a misdemeanor charge, in the absence of law conferring authority to do so. *State v. Hance*, 26 Ohio Cir. Ct. R. 273.

Under a statute prohibiting the chairman *pro tem* of the board of council from acting as mayor, except for inability of the mayor to act or absence from the country for at least three days does not require such absence to be for three days after the election of such chairman *pro tem*, to authorize him to act as mayor. *Chesapeake & O. Ry. Co. v. Maysville*, 24 Ky. L. R. 615, 69 S. W. 728.

23. §§ 325, 329 *ante*.

not be appointed by the governor of the state or created by legislative act. Constitutions and laws generally provide, as pointed out elsewhere, that the local authority shall select all local officers.<sup>24</sup> However, as mentioned, the power of the legislature to authorize the creation of such boards by the state and the appointment of the officers thereof by the governor depends upon the laws of the particular jurisdiction.<sup>25</sup>

Board of park commissioners are sometimes created by statute.<sup>26</sup> A legislative act creating a board of park commissioners in certain cities and which vests the board with full power over the parks of such cities is held in Iowa not to be the creation of a new municipality distinct from that of a city, but the view was expressed that the board is an instrument in aid of the municipal government.<sup>27</sup>

### § 435. The water department.

Under some laws the water department may be created and established by the state;<sup>28</sup> however, as mentioned

24. § 176 *ante*; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

25. *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660; *Eaton v. Burke*, 66 N. H. 306, 22 Atl. 452.

Act creating board of public works, held to take away the power of the council relative to highways. *In re Public Works of Wattertown*, 67 Hun (N. Y.) 190, 22 N. Y. S. 112, affirmed in 144 N. Y. 440, 39 N. E. 387.

26. *In re Knaust*, 101 N. Y. 188, 4 N. E. 338.

See chapter on Corporate Property, *post*.

27. *Orvis v. Park Commissioners of Des Moines*, 88 Iowa 674,

45 Am. St. Rep. 252, 56 N. W. 294.

Park commissioners held not corporation. *Rauh v. Department of Public Park Commissioners*, 66 How. Pr. (N. Y.) 368.

When state agency, governor may remove commissioners. *Wilcox v. People*, 90 Ill. 186. And fill vacancy. *Holder v. People*, 90 Ill. 434.

Council may remove. *Gibbs v. Louisville*, 99 Ky. 490, 36 S. W. 524.

Park commissioners to have charge of parks of city. *Holder v. People*, 90 Ill. 434; *Sidway v. South Park Commissioners*, 120 Ill. 496, 11 N. E. 852.

28 § 220 *ante*.

elsewhere, the management of water works to supply the inhabitants of the local community with water is usually regarded by the courts as a purely local or municipal function, and, therefore, the commissioner or board in control of such service is ordinarily created by the municipal authorities by appointment by the mayor or the governing legislative body, or elected by the qualified electors.<sup>29</sup> Such a board with power to contract, to sue, and be sued, may be a body corporate.<sup>30</sup>

### § 436. Police department.

As mentioned elsewhere, usually the police department is an agency of the state and the officers thereof are state

29. *State v. Puito*, 7 Ohio St. 355.

**Water department.** Boards organized to control water and sewerage works are municipal and not state agencies. *State ex rel. Saunders v. Kohnke*, 109 La. 838, 33 So. 793.

Established by council and board elected by the people. *Lafayette v. State*, 69 Ind. 218.

Board appointed. *Obrien v. Thorogood*, 162 Mass. 598, 39 N. E. 287.

Sometimes certain city officers are constituted a board of water commissioners. *Lamb v. Schottler*, 54 Cal. 319.

A member of the board of water commissioners, held to be a civil officer. *State ex rel. v. Valle*, 41 Mo. 29.

A legislative act conferring power to manage water works for a city by a committee created by the

act is constitutional, the members of the committee are agents of the corporations and not officers. *David v. Portland Water Committee*, 14 Ore. 98, 12 Pac. 174.

30. *State ex rel. v. Kohnke*, 109 La. 838, 33 So. 793.

**Water board as corporation.** Board of water commissioners, when not a corporation. *Appleton v. Water Commissioners of New York*, 2 Hill (N. Y.) 432.

The fact that the act creating the board of water commissioners authorizes contracts to be made in the name of the board as the representative of the city does not create a corporation within the meaning of the Constitution. *Morton v. Power*, 33 Minn. 521, 24 N. W. 194.

**Water Commissioners of City of New York under early charter.** *Appleton v. Water Commissioners of N. Y.*, 2 Hill. (N. Y.) 432.

officers subject to such control as the state may provide.<sup>31</sup> The police power is one of the powers of the state, but as mentioned elsewhere, the control of the police power of the community may be committed to the local authorities.<sup>32</sup>

If the department is a department of the state, the officers thereof may be appointed by the state.<sup>33</sup> Usually the department is controlled by a board or commissioners who may be appointed or removed by the governor.<sup>34</sup>

The status of the department and the tenure of the office of the commissioners and of the officers of the department, of course, depends upon the controlling law.<sup>35</sup> Usually the expenses of the department are required to be paid by the local community.<sup>36</sup> The officers

31. § 181 *ante*.

**Policeman held to be a public officer of the state.** *Farrell v. Bridgeport*, 45 Conn. 191; *Kimball v. Boston*, 1 Allen (Mass.) 417; *Buttrick v. Lowell*, 1 Allen 172, 79 Am. Dec. 721; *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333.

32. § 181 *ante*.

33. **Police Commissioners v. Louisville**, 66 Ky. (3 Bush.) 597; *Baltimore v. Howard*, 20 Md. 335.

34. **In re Fire and Excise Commissioners**, 19 Colo. 482, 36 Pac. 234; *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *State v. Seavy*, 22 Neb. 454, 35 N. W. 228; *State v. Bennett*, 22 Neb. 470, 35 N. W. 235.

**State may take the police power from city and give the control thereof to the state.** *State ex rel. v. New Orleans*, 41 La. Ann. 156, 6 So. 592; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

**Removal only for cause.** *State v. Smith*, 35 Neb. 13, 16 L. R. A. 791, 52 N. W. 700.

**Political qualifications.** *Ib.*

**Board an administrative tribunal.** *Gibbon v. Freed*, 93 N. Y. 93.

35. *Sugden v. Partridge*, 66 N. E. 655, 174 N. Y. 87; *Houston v. Albers* (Tex. Civ. App. 1903), 73 S. W. 1084.

**Removal.** **Conferring power on mayor to remove police commissioner for specified cause is valid; it does not confer judicial power.** *State ex rel. v. Mayer*, 43 La. Ann. 92, 8 So. 893.

**Supreme court, power to remove,** *People v. Crissey*, 91 N. Y. 616.

**Police department, creating police district of city and adjacent territory, held valid.** *People v. Draper*, 25 Barb. (N. Y.) 344.

**State police law, held unconstitutional.** *People v. Acton*, 48 Barb. (N. Y.) 524, 33 How. Pr. 52; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.

36. **Expenses paid by city.** *Prince v. Boston*, 148 Mass. 285, 19 N. E. 218; *Ellis v. Lemmon*, 86 Mich. 468, 49 N. W. 308.

or authority authorized to appoint commissioners to manage the department or officers and subordinates of the department will depend, of course, on the law applicable. As stated, this power ordinarily rests in the state; however, under some laws, the power may be vested in named local authorities.<sup>37</sup>

The power of the commissioners or those in control of the department, touching its management and the manner of incurring the expenses therefor and the salaries of the members of the force, the grades in the service,

37. **Control of police and appointment of officers, etc.** Legislative acts, for appointment of police commissioners by governor and authorizing them to levy taxes and create indebtedness, held unconstitutional. *Heinze v. People*, 92 Ill. 406.

Members of police board held "officers of cities and towns," within the meaning of the Constitution and must be selected by the people and cannot be appointed by the governor. *Speed v. Crawford*, 60 Ky. (Metc.) 207.

Compare *Police Commissioners v. Louisville*, 3 Bush. (68 Ky.) 597.

Commissioners appointed by council. *Baker v. Police Commissioners*, 62 Mich. 327, 28 N. W. 913; *People v. Crissey*, 91 N. Y. 616; *Lyon v. Gloucester*, 49 N. J. L. 177, 6 Atl. 518.

Selectmen of town authorized to appoint. *Commissioner v. Higgins*, 4 Gray (70 Mass.) 34.

Appointed by executive council. *State v. Hunter*, 38 Kan. 578, 17 Pac. 177.

Mayor may appoint police commissioners. *State v. Butte* (Mont., 1910), 109 Pac. 710.

Mayor authorized to appoint special policemen temporarily. *State v. Holmes*, 118 N. C. 201, 24 S. E. 119; *Union Depot Ry. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329.

Sometimes police commissioners are appointed by probate court. *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, 21 L. R. A. 529, 13 So. 416.

Judges of local courts sometimes appoint members of police force. *Staudé v. San Francisco*, 61 Cal. 313; *People v. Gunst*, 110 Cal. 447, 42 Pac. 963.

Governor cannot remove commissioner when appointed by judges of local court. *People v. Gunst*, 110 Cal. 447, 42 Pac. 963.

Policeman, held not to be an officer within the meaning of a charter relating to appointments by the mayor. *Attorney General v. Cain*, 82 Mich. 223, 47 N. W. 484.

Policeman, held to be officer under city charter. *Jacksonville v. Alton*, 25 Ill. App. 54.

promotions, etc., are all controlled by the law applicable, as will appear in the numerous cases cited in the note.<sup>38</sup>

38. Management of police—illustrative cases. Commissioners to be residents of the city in which they are to serve. *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, 21 L. R. A. 529, 13 So. 416.

Three of the five members of the board of police commissioners of the city of Newark, N. J., constitute a quorum of the board and their united action is valid. *McMannus v. Board of Police Commissioners*, 73 N. J. L. 307, 62 Atl. 997.

Power of police commissioners to establish grades. *People v. Police Commissioners*, 108 N. Y. 475, 15 N. E. 692.

Where a police board has authority to make rules for the examination of applicants for the police force, its failure to make such rules cannot affect the right of one appointed policeman by such board. *Houston v. Estes*, 35 Tex. Civ. App. 99, 79 S. W. 848; *Houston v. Clark* (Tex. Civ. App.), 80 S. W. 1198; *Houston v. Johnson*, 79 S. W. 1199.

The police commissioner of New York has no power to form into a board the surgeons allowed the department by statute. *Metcalf v. McAdoo*, 95 N. Y. S. 511, 48 Misc. Rep. 420; *People v. McAdoo*, 96 N. Y. S. 892, 77 N. E. 17.

Oath of office; policemen not required to take, under some laws. *Commonwealth v. Dugan*, 12 Metc. (53 Mass.) 233; *Commonwealth v. Cushing*, 99 Mass. 592; *Morgan v. Quachenbush*, 22 Barb. (N. Y.) 72.

Is mayor executive head, when

member of board? *Francis v. Blair*, 96 Mo. 515, 9 S. W. 894, affirming 89 Mo. 291, 1 S. W. 297.

Rule forbidding members of police force from soliciting funds for political purposes, and becoming members of political committees, etc., valid. *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N. E. 517.

Injunction will not lie to restrain a police captain in New York City from stationing officers in front of a hotel where liquors are sold, but he will be restrained from interfering with the business of the hotel by stating to customers that the house will be raided and the occupants arrested. *Delany v. Flood*, 91 N. Y. S. 672, 45 Misc. Rep. 97, citing *Weiss v. Herlihy*, 49 N. Y. S. 81, 23 App. Div. 81; *People v. Herlihy*, 73 N. Y. S. 236, 66 App. Div. 538.

Policeman, held to be an officer within the meaning of the statute defining assaults on officers. *Sanner v. State*, 2 Tex. App. 458.

Law authorizing commissioners to issue certificates of debt, held constitutional. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

A captain of police is guilty of a willful and flagrant neglect of duty who, without the commissioner's permission, withdraws a police officer from a duty assigned to him by the commissioner and details such officer to do work other than police duty. *People v. Greene*, 87 N. Y. S. 1017, 94 App. Div. 287, reversed in 72 N. E. 99.

Under the New York charter the police commissioner has author-



Under the Portland city charter the police commission has power to reduce the size of the force to keep the expenses within the appropriations, and to summarily remove officers for that purpose.<sup>39</sup>

The function of the police is to enforce the state laws within the jurisdiction of the corporate limits of the local community they serve, but their chief function is to enforce the local police regulations.<sup>40</sup>

ity to require a detective sergeant to perform the duties of a sergeant of police. *People v. Greene*, 86 N. Y. S. 322, 91 App. Div. 58.

But where such sergeant so assigned violates the rules governing police sergeants, his plea of ignorance of the rules is an excuse, the sufficiency of which is to be determined by the commissioner. *People v. Greene*, 86 N. Y. S. 322, 91 App. Div. 58.

A rule of the police department requiring captains of police to report the location of suspicious houses and places vests in such captains the right to exercise their discretion regarding such places. *People v. Greene*, 87 N. Y. S. 172, 92 App. Div. 621.

39. *Venable v. Board of Police Comr's*, etc., 40 Ore. 458, 67 Pac. 203.

**Assignment of policemen to duty.** Under the Maryland statute requiring certain police commissioners, at the request of the park commission "to detail from time to time" members of the police force, as the park commissioner may deem necessary to preserve order in parks, does not require that a designated number of patrolmen shall be furnished all the year round and an additional

number during the summer months. *Upshur v. Baltimore*, 94 Md. 743, 51 Atl. 953.

A section of a charter providing that the police commissioner "shall assign to duty the officers and members of the police force and shall have power to change such assignments from time to time," as the exigencies of the service may require, was held sufficient to authorize the commissioner to require any member of the police force, no matter what his grade, to perform such police duty as the commissioner may deem necessary. *People v. Greene*, 86 N. Y. S. 322, 91 App. Div. 58.

40. **Powers of police.** May arrest beyond city limits. *Chrisman v. Carney*, 33 Ark. 316.

Offense beyond limits, no authority. *In re Hotchkiss*, 6 D. C. 168.

Town police officer may act in offenses, other than against town by-laws. *Com. v. Martin*, 98 Mass. 4.

Under Missouri laws and the charter of St. Louis, members of the police force of the City of St. Louis have no jurisdiction to make arrests outside the city limits, e. g., for offenses committed in St. Louis County. *State v. Stobie*, 194 Mo. 14, 92 S. W. 191.

The power of the police concerning arrests is fully considered elsewhere.<sup>41</sup>

### § 437. City marshal.

The office of city marshal is common in cities, towns and villages. Sometimes the city marshal is elected and sometimes he is appointed by the local authority.<sup>42</sup> He is usually a municipal officer.<sup>43</sup>

The law relating to his election or appointment, eligibility, term of office, functions and liabilities are, in the main, substantially the same as other officers who serve the local public.<sup>44</sup>

As respects the authority and duty of a city marshal, generally speaking, he occupies the same relation to the

Under a statute authorizing the inspection of junk shops, a police officer has no authority to enter such shops to search for stolen property, unless he has a search warrant. *Neifeld v. State*, 23 Ohio Cir. Ct. R. 246.

41. Chs. 19 and 26 *post*.

42. *Bryan v. Des Moines*, 51 Iowa 590, 2 N. W. 414; *Owensboro v. Webb*, 2 Metc. (59 Ky.) 576.

**Appointment after time specified, held valid.** *Greer v. Asheville*, 114 N. C. 678, 19 S. E. 635.

City may appoint, notwithstanding a legislative act provides for the organization of a police force for such city without the intervention of its authorities. *People v. Canty*, 55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133.

Where the office is abolished by state law, election of marshal thereafter is void. *Gano v. State*, 10 Ohio St. 237.

43. *Attorney General v. Connors*, 27 Fla. 329, 9 So. 7; *French v. Cowan*, 79 Me. 426, 10 Atl. 335;

*Upshur v. Hamilton*, 95 Md. 561, 52 Atl. 977.

44. *Sheridan v. Colvin*, 78 Ill. 237; *North v. People*, 139 Ill. 81, 28 N. E. 966; *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 339; *Cummings v. Puett*, 97 Ga. 247, 22 S. E. 933; *Neiser v. Thomas*, 99 Mo. 224, 12 S. W. 725.

**Term, as other city officers.** *People v. Brown*, 83 Ill. 95; *Forristal v. People*, 3 Ill. App. 470; *French v. Cowan*, 79 Me. 426, 10 Atl. 335; *Stadler v. Detroit*, 13 Mich. 346; *Beck v. Hanscom*, 29 N. H. 213.

**Property of office.** One who has been duly elected to the office of city marshal is entitled to the possession of the property and paraphernalia belonging to such office. *Christy v. Kingfisher*, 13 Okla. 585, 76 Pac. 135.

**Office may be abolished.** A legislative act providing for the organization of the police force may abolish the office of city marshal. *State v. Gano*, 3 Ohio Dec. 177.

governmental affairs of the city, town or village as the sheriff does to the county.<sup>45</sup> His duties are ordinarily prescribed by charter or ordinance. He is often given the power and authority of a constable at common law or under the statute. In addition to executing the process of the municipal police or corporation courts he is sometimes authorized to execute the process directed to him by justices of the peace residing within the municipal limits.<sup>46</sup> Sometimes the authority of a marshal as a peace officer extends to the limits of the county in which the city or town is located.<sup>47</sup>

The liability of the marshal for negligence, malfeasance or misfeasance in office are usually the same as appertain to other peace officers and those whose duty it is to execute legal process. To illustrate: he may be held liable for permitting the escape of prisoners;<sup>48</sup> or, for trespass for taking possession of property under legal process;<sup>49</sup> or he may be held liable in damages for unnecessary cruelties and indignities inflicted by him on prisoners in his charge;<sup>50</sup> or, for the negligence of an agent employed by him to catch dogs under ordinance and proclamation by the mayor.<sup>51</sup> His liability in these and other respects,

45. *Attorney-General v. Connors*, 27 Fla. 329, 9 So. 7; *State ex rel. v. Mason*, 4 Mo. App. 377.

46. *Stewart v. People*, 15 Ill. App. 336.

47. *Newbury v. Durham*, 88 Tex. 288, 31 S. W. 195.

May be complainant and serve process. The fact that the marshal is the complainant of the violation of an ordinance does not disqualify him from serving as marshal in the prosecution. *Mineral City v. Render*, 51 Ohio St. 122, 42 N. E. 255.

Contest for office. Without express grant by state, council can not determine contest for office of. *Vosburg v. McCrasy*, 77 Tex. 568, 14 S. W. 195.

**As chief of police.** In Kentucky where the duties of marshal of a third class city are the same as those of chief of police of a city of the second class, a marshal of a city of the former class will be treated as chief of police upon the coming of such city into the latter class. *Gilbert v. Paducah*, 24 Ky. L. Rep. 1998, 72 S. W. 816.

48. *Zenner v. Blessing*, 4 N. Y. S. 866.

49. *Cornell v. Fell*, 2 City Ct. Rep. (N. Y.) 151.

50. *Topeka v. Boutwell*, 53 Kan. 20, 27 L. R. A. 593, 35 Pac. 819.

51. *Pritchard v. Keefer*, 53 Ill. 117.

growing out of the performance of his public duties, of course, is controlled by the law applicable and the circumstances of each particular case.

### § 438. Fire department.

Whether the fire department shall be controlled by the local corporation or by the state, and whether it is a department of the city or a *quasi*-corporation, must be determined by the law applicable.<sup>52</sup>

The department is usually controlled by a board, or commissioners, who, in some jurisdictions, may be appointed and removed by the governor of the state.<sup>53</sup> Sometimes the fire department is a department of the city government.<sup>54</sup> Occasionally, fire districts are estab-

52. *State v. Crawford*, 17 R. I. 292, 21 Atl. 546.

Fire department covering limits of two cities liable to suit as a corporation, *sub modo* for tort. *Clarissy v. Metropolitan Fire Department*, 7 Abb. Pr. N. S. (N. Y.) 352.

Fire district as a *quasi*-corporation with power to sue and be sued. *Prout v. Pittsfield Fire District*, 154 Mass. 450, 28 N. E. 679.

53. *People v. Auburn Fire Com'rs*, 50 N. Y. S. 506, 27 N. Y. App. 530; *In re Bulger*, 45 Cal. 553; *Trimble v. People*, 19 Colo. 187, 34 Pac. 981; *State v. Smith*, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791.

Commissioners of, appointed and removed by governor. *In re Fire and Excise Commissioners*, 19 Colo. 482, 36 Pac. 234; *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *State v. Bennett*, 22 Neb. 470, 35 N. W. 235.

State statute providing for the appointment of a board of fire commissioners by the board of underwriters of the city, which was composed of the agents of the various insurance companies doing business in the state, held valid. *In re Bulger*, 45 Cal. 553.

54. *People v. San Francisco Fire Dept.*, 14 Cal. 479; *Empire Hook and Ladder Co. v. Phoenix Ins. Co.*, 12 N. Y. St. Rep. 510; *People v. Newman*, 96 Cal. 605, 31 Pac. 564; *Wright v. Hartford*, 50 Conn. 546; *Ader v. Newport*, 9 Ky. L. Rep. 748, 6 S. W. 577.

Selection or appointment. Authority of acting mayor to appoint board of fire and police commissioners. *Watkins v. Mooney*, 24 Ky. L. R. 1469, 71 S. W. 622.

Sometimes by legislative act selectmen of town are authorized to establish. *Long v. Sargent*, 101 Mass. 117; *People v. Orr*, 22 Colo. 142, 43 Pac. 1005.

lished as public corporations.<sup>55</sup> The method of administering the department is controlled entirely by the laws applicable, and greatly vary in the several municipal corporations.<sup>56</sup>

### § 439. The health department.

This department is occasionally a public corporation of the state;<sup>57</sup> often boards of health are created for cities by state statutes,<sup>58</sup> and sometimes the municipal

Some constitutions prescribe that fire commissioners shall be elected.

The office of examiner in the fire department need not be elected or appointed by local authority. *Fire Department of New York v. Atlas S. S. Co.*, 106 N. Y. 566, 13 N. E. 329.

55. Fire district, as *quasi* corporation, with power to sue and be sued, etc. *Prout v. Pittsfield Fire District*, 154 Mass. 450, 28 N. E. 679; *Clarissy v. Metropolitan Fire Department*, 7 Abb. Pr. N. S. (N. Y.) 352.

56. Administration of fire department. Cannot prevent use of extinguishers of fire within city, but operations of fire department cannot be obstructed by use of. *Teutonia Ins. Co. v. O'Connor*, 27 La. Ann. 371.

Executive officer, known as chief or fire marshal. *Higgins v. Cole*, 100 Cal. 260, 34 Pac. Rep. 678; *Williams v. Newport*, 12 Bush. (75 Ky.) 438; *Harris v. People*, 64 N. Y. 148, affirming 4 Hun (N. Y.) 1.

Powers as to, vested in council or department, cannot be delegated. *Benjamin v. Webster*, 100 Ind. 15; *N. Y. Fire Department v. Stutztevant*, 38 Hun (N. Y.) 407.

Powers of inspection of building sometimes conferred upon fire department. *Fire Department v. Atlas S. S. Co.*, 106 N. Y. 566, 13 N. E. 329.

Board has no authority to empower one member to exercise power of whole board. *Coffin v. Nantucket*, 5 Cush. (59 Mass.) 269.

Disabled firemen, right to employment not requiring active service. *People v. Sturgis*, 176 N. Y. 563, 68 N. E. 1123, affirming 85 App. Div. 20, 82 N. Y. S. 953.

Laws regulating appointments—constitutionality—probation, *Fish v. McGann*, 205 Ill. 179, 68 N. E. 761, affirming judgment, 107 Ill. App. 538.

Appointment of firemen by board of fire commissioners for term beginning under new board. *Dickinson v. Jersey City*, 68 N. J. L. 99, 52 Atl. 278.

57. Taylor v. Board of Health of Philadelphia, 31 Pa. St. 73, 72 Am. Dec. 724; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

58. *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *State v. Routh*, 61 Minn. 205, 63 N. W. 621.

authorities, e. g., the governing legislative body, usually the council, is empowered to establish boards of health or health departments to protect the matter of sanitation and health of the inhabitants of the local community.<sup>59</sup> Many municipal charters create health departments, or authorize the council or legislative authority to do so by appropriate ordinances.<sup>60</sup>

### § 440. Law department.

It is usual to make provisions in municipal charters or state laws applicable to the government of local public corporations for the conduct of the legal business concerning the public in the community. In the larger cities a legal department is created with a head and assistants or subordinates. The head is usually known as corporation counsel, city counselor, city solicitor, or city attorney. Generally speaking this department is required to give legal advice to the municipal officers and attend to all legal matters and suits in which the local corporation is a party or in which such corporation is directly or indirectly interested. The scope and precise nature of these duties must be determined by the local laws applicable. Sometimes the legal officer must be requested or directed to handle the matter in question by the mayor or an officer or a head of a department, and sometimes this officer is invested with discretionary powers.<sup>61</sup>

59. *Quinn v. Cumberland County*, 162 Pa. St. 55, 29 Atl. 289.

60. *St. Louis Charter*, art. XII; *The Municipal Code of St. Louis* (1901, McQuillin), p. 296 *et seq.*

61. **Qualified voter eligible.** Where the charter provides that "all persons qualified to vote" shall be eligible to any municipal office, a qualified voter is eligible to the office of city attorney, though he is not a duly admitted attorney at law. *State ex rel. v. Nichols*, 83 Minn. 3, 85 N. W. 717.

**Office may be abolished.** The action of the common council in abolishing the office of city attorney is the exercise of a legislative power and will not be interfered with by the courts. *Downey v. State ex rel.*, 160 Ind. 578, 67 N. E. 450; *Goodwin v. State ex rel.*, 142 Ind. 117, 41 N. E. 359.

**Act extending term void.** An act of the legislature attempting to extend the term of office of a city attorney is violative of a constitutional provision requiring all

The opinion has been expressed in an Illinois case that the relation existing between a city attorney and the city council is not that of attorney and client; he is the law officer of the city, but is not the servant of the city council. "In suits that concern the city regarded as an individual, the city attorney is required to follow the direction of the city council; but in all matters that merely concern the public, which are for the preservation of morals, and maintenance of good order, the abatement of public nuisances, the destruction of dens of vice and infamy, he is wholly independent of the city council, is a servant of the people, and as to such matters, vested with powers and burdens with duties over which the council has no jurisdiction."<sup>62</sup>

In Ohio a city solicitor may commence *mandamus* proceedings to compel a municipal officer to perform a duty expressly enjoined by law, without being authorized to do so by the council.<sup>63</sup>

A city attorney has no greater power to bind the city by an agreement than an attorney would have in the case of an individual.<sup>64</sup>

The cases in the note further indicate the scope and nature of the duties of this officer or department.<sup>65</sup>

city officers to be elected by the electors of the city. *State ex rel. v. Krez*, 88 Wis. 135.

See, also *State v. Wilson*, 142 Ind. 102, 41 N. E. 361.

62. *Flynn v. Springfield*, 120

See *Underwood v. Wilhite*, 141 Ky. 130, 132 S. W. 141.

63. *State v. Bowers*, 26 Ohio Cir. Dec. 326, affirmed in 70 Ohio 423.

**Action without authority—raising point.** The objection that an action was brought by the city attorney without authority from the council is not ground for demurrer, but must be raised by an-

swer, if at all. *Milwaukee v. Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187.

64. *Stone v. Bank of Commerce*, 174 U. S. 312, 19 Sup. Ct. 747, 43 L. Ed. 1028.

See *Bush v. O'Brien*, 164 N. Y. 205, 58 N. E. 106.

65. **Compromise claims.** A city attorney of a city of the first class has no power, under the city charter and the statutes of Kentucky, to compromise claims for taxes, neither before nor after suit brought. *Louisville v. Louisville Ry. Co.*, 23 Ky. L. Rep. 390, 63 S. W. 14.

### § 441. Department of education.

This department may be created by the state, or by the local corporation when duly authorized, and it may be a public corporation disconnected with the government of the municipal corporation, or it may be a department of the local corporation.<sup>66</sup> This subject is mentioned elsewhere in this work where the municipal corporation proper is contrasted with the school district as a *quasi*-corporation, and the powers of the latter are stated.<sup>67</sup>

**Interest of municipal corporation.** A charter provision requiring the corporation counsel to "have charge and conduct of all the law business in which the city is interested" refers not to a speculative or theoretical interest, but to a legal interest, and the corporation counsel has no authority thereunder to appear for and defend, a policeman in an action for a wilful assault in making an arrest. *Donahue v. Keeshan*, 87 N. Y. S. 144, 91 App. Div. 602.

**Duty to act for boards.** Under the charter of San Francisco it is the duty of the city attorney, when so required, to appear for and defend the board of education in all suits brought against it. *Denman v. Webster*, 139 Cal. 452, 70 Pac. 1063, 73 Pac. 139.

**Discretion as to acting.** A charter providing that the corporation counsel may in his discretion, whenever requested by the head of a department, appear in or direct any action against any city for acts done by such officer while in the performance of his duty, invests such head of department vests such head of a department whether such action is, *prima facie*, one instituted by reason of

acts done in the performance of duty, and such determination is not subject to judicial review. *Briggs v. Lahey*, 91 N. Y. S. 576, 101 App. Div. 136.

**May appear against municipal officers.** An ordinance requiring a village attorney to prosecute and defend actions by or against the village or any office thereof, for penalties or forfeitures incurred, does not disqualify such attorney from prosecuting an action against the president and clerk of the village to compel them to issue and sign an order for the payment of a claim against the village. *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547, 12 Det. Leg. N. 860.

66. Sometimes a city or town is authorized to establish and maintain schools. *Le Counteulx v. Buffalo*, 33 N. Y. 333.

67. §§ 113, 114 *ante*.

As a municipal board, within charter provision. *State v. Board of Education*, 54 N. J. L. 313, 23 Atl. 670.

**Board of education**, as a corporation distinct from city. *Board of Education v. Detroit*, 30 Mich. 505; *Heller v. Stremmel*, 52 Mo. 309; *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536; *Albuquerque*, etc.



The function of a board of education is to provide the means for the education of the youth of the locality, and the particular manner in which this shall be done depends to a large extent upon the discretion of the members thereof and the laws under which their authority is exercised.<sup>68</sup>

Co. v. Albuquerque, 9 N. M. 441, 54 Pac.; Gunnison v. New York Bd. of Ed., 81 N. Y. S. 181, 80 App. Div. 480; People v. Neilson, 48 How. Pr. 454.

As *quasi*-corporation, may sue. Board of Education v. Fowler, 19 Cal. 11.

May sue and be sued. Donovan v. Board of Education, 55 How. Pr. (N. Y.) 176.

Board of education, organized to manage school system, held body corporate. Gunnison v. Board of Education of New York, 81 N. Y. S. 181, 80 App. Div. 480, judgment affirmed, 176 N. Y. 11, 68 N. E. 106.

Not department of city government. People v. Neilson, 48 How. Pr. (N. Y.) 454; Bailey v. Philadelphia, 167 Pa. St. 569, 46 Am. St. Rep. 691, 31 Atl. 925.

Under the charter of Detroit providing that the board of education shall be a body corporate and may sue and be sued as such, and hold and convey property, such board is a municipal corporation, and is not liable for injuries caused by the negligence of its servants and agents. Whitehead v. Board of Education, 139 Mich. 490, 102 N. W. 1028, 11 Det. Leg. N. 923.

Officers of boards. Superintendent of Schools may be elected by town council. Verry v. School

Committee of Woonsocket, 12 R. I. 578.

Members of municipal boards, required to be electors of city. Gunnison v. Board of Education of New York, 81 N. Y. S. 181, 80 App. Div. 480, judgment affirmed, 176 N. Y. 11, 68 N. E. 106.

One may be a member of board of education and deputy sheriff, as the offices are not incompatible. State ex rel. v. Bus, 135 Mo. 325, 33 L. R. A. 616, 36 S. W. 636.

When members and officers of, not liable for negligence of workmen in repairing school property. Donovan v. McAlpin, 85 N. Y. 185, 39 Am. Rep. 649.

Treasurer of, to observe rules. Board of Education v. Runnels, 57 Mich. 46, 23 N. W. 481.

68. **Power of board of education.** The board of public education of Philadelphia has authority to select sites for public schools, determine the number of school houses and when they should be built and to condemn ground to obtain desirable sites. Commonwealth v. Davis, 199 Pa. 278, 49 Atl. 75.

Where the board of education has the power to consolidate classes or discontinue a school or class, it necessarily has the power of determining what teacher, in such event, shall be retired. Bates

Libraries are sometimes established under the control of the municipal corporation;<sup>69</sup> sometimes boards are created to administer library affairs, with power to purchase property;<sup>70</sup> and sometimes separate corporations are created for this purpose.<sup>71</sup>

## § 442. Various municipal departments.

Other departments frequently exist, to aid the state in enforcing the state's authority within the limits of the local community, and also to promote the welfare of the inhabitants of the municipal corporation. For example, an officer to take charge of and control excise affairs, sometimes appointed by the state,<sup>72</sup> and sometimes chosen by the local authorities, as the mayor.<sup>73</sup> Excise commissioners may also be city or town officers.<sup>74</sup>

The following are also usual: Election departments, controlled by commissioners or boards, appointed by the

v. Board of Education, 139 Cal. 145, 72 Pac. 907.

Where the board of education is empowered by charter, in its discretion, "to establish the text books to be used in the city" allegations as to inexpediency, impropriety, and bad motives of certain members of the board are of no significance. *Madden v. Kinney*, 116 Wis. 561, 93 N. W. 535.

School property owned by the city is under the control of the board of education. *Owen v. New York*, 126 N. Y. S. 38, 141 App. Div. 217.

69. *Kelso v. Teale*, 106 Cal. 477, 39 Pac. 948.

70. *Smith v. Library Board*, 58 Minn. 108, 25 L. R. A. 280, 59 N. W. 979.

Act of board committee as to selection of library site binding on city, when. *Attorney General v. Nashua*, 67 N. H. 478, 32 Atl. 852.

71. Occasionally boards and trustees of schools are corporations for each ward, respecting school property. *Betts v. Betts*, 4 Abb. N. C. (N. Y.) 317.

72. *People v. Martin*, 19 Colo. 565, 24 L. R. A. 201, 36 Pac. 543; *State ex rel. v. St. Louis*, 119 Mo. 70, 24 S. W. 765; *State v. Cherry*, 53 N. J. L. 113, 20 Atl. 825.

73. *People v. Andrews*, 104 N. Y. 570, 12 N. E. 274, 42 Hun 614; *People v. Lahr*, 71 Hun (N. Y.) 721, 24 N. Y. S. 1020.

74. *Montgomery v. O'Dell*, 67 Hun (N. Y.) 169, 22 N. Y. S. 412.

state;<sup>75</sup> departments of docks;<sup>76</sup> harbor and wharfs;<sup>77</sup> boards of street commissioners;<sup>78</sup> sewer departments;<sup>79</sup> gas works;<sup>80</sup> lighting department;<sup>81</sup> boards of public safety;<sup>82</sup> and boards or commissioners to control charities and charitable institutions, as dispensaries, hospitals, etc.<sup>83</sup> Such departments may or may not be created and controlled by the state. With some exceptions, they are generally managed by the municipal authority.

Frequently other departments exist.<sup>84</sup> The judicial and legislative departments are considered in other chapters.<sup>85</sup>

75. *State ex rel. v. Mason*, 155 Mo. 486, 55 S. W. 636; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887.

§ 324 *ante*.

76. Department of docks as independent of local government. *Bigler v. New York*, 5 Abb. N. C. (N. Y.) 51.

77. § 325 *ante*.

78. *Schumm v. Seymour*, 24 N. J. Eq. 143.

79. § 325 *ante*.

80. Philadelphia Gas Works, held not to be a department of the municipal government. *Hacker v. Philadelphia*, 6 Phila. (Pa.) 94.

81. See ch. 9, The municipal charter, *ante*.

82. Board of public safety. *Louisville v. Young*, 23 Ky. L. Rep. 1429, 65 S. W. 599; *Gorley v. Louisville*, 23 Ky. L. Rep. 1782, 65 S. W. 844.

83. Charities or charitable institutions. Commissioners sometimes control appointed as other municipal officers. Have supervisory control over charitable and

penal institutions and power to remove officers of, etc. *State ex rel. v. Brown*, 57 Mo. App. 199.

Commissioners of public charities made overseers of poor. Board of Commissioners, etc. *v. McGurrian*, 6 Daly (N. Y.) 349.

Hospitals controlled by city (sometimes). *City Council v. Boyd*, 1 Mills Const. Rep. (S. C.) 353.

Salaries often fixed by city council, as city physician. *Preble v. Bangor*, 64 Me. 115; *Edgecomb v. Leviston*, 71 Me. 343.

Legislative act providing for the appointment of a superintendent of a municipal corporation is valid as this is a state matter. *State v. New Orleans*, 15 La. Ann. 354; *State ex rel. v. Griffin*, 15 La. 420.

84. Ch. 9, The municipal charter, *ante*.

85. Legislative department, ch. 13 *post*.

Judicial department, ch. 26 *post*.

See § 324 *ante*.

## 4. ELIGIBILITY TO HOLD PUBLIC OFFICE OR PLACE.

## § 443. Officers must possess the prescribed qualifications.

State constitutions, municipal charters and state laws applicable usually prescribe what persons are eligible to hold public office or place, and provide, sometimes with precision, and sometimes generally, the qualifications necessary.<sup>86</sup> And the general rule is that, unless the officer or person possesses the qualifications as prescribed he is ineligible to hold the office or situation involved.<sup>87</sup> Qualification is as essential as election to the right to hold office; for the right of one elected to an office to be inducted is in subordination to the Constitution, and the officer must possess the constitutional qualifications before he can fill the office.<sup>88</sup>

The qualifications prescribed by constitution or statute are usually sufficient.<sup>89</sup> It is self-evident that a statute cannot change the qualifications fixed by the Constitution;<sup>90</sup> nor can an ordinance, those named in the charter.<sup>91</sup>

86. *State ex rel. v. Badger*, 90 Mo. App. 183.

Civil officer. City treasurer held not a civil officer within the meaning of a constitutional provision excluding clergymen from civil office. *State v. Wilmington*, 3 Har. (Del.) 294.

Aldermen and councilmen are civil officers under the constitution of Rhode Island. In re Newport Charter, 14 R. I. 655.

Lucrative office. Office of councilman held not a lucrative office within the meaning of a provision of the constitution of Indiana. *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239.

87. *People v. Maxwell*, 169 N.

Y. 608, 62 N. E. 1099, affirming 73 N. Y. S. 527, 65 App. Div. 265; *People v. Ballhorn*, 100 Ill. App. 571; *Barker v. Southern Const. Co.*, 20 Ky. Law 796, 47 S. W. 608; *State v. Bayonne*, 30 N. J. L. 476.

88. *Hannon v. Grizzard*, 96 N. C. 293, 2 S. E. 600.

89. *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869; *State v. Swearingen*, 12 Ga. 23; *State v. Blanchard*, 6 La. Ann. 515; *Com. v. Corcoran*, 9 Kulp (Pa.) 507.

90. *State v. Holman*, 58 Minn. 219, 59 N. W. 1006; *State v. Stevens*, 29 Ore. 464, 44 Pac. 898.

91. *Com. v. Willis*, 19 Ky. L. Rep. 962, 42 S. W. 1118.

Unless the qualifications are provided in the Constitution, they may be defined by statute,<sup>92</sup> or charter; and sometimes ordinances specify the qualifications.

It is sometimes held that females are not eligible to hold office unless the law applicable expressly so provides,<sup>93</sup> however, in Colorado, the right is recognized.<sup>94</sup>

Laws usually forbid officers from being interested in contracts of any character with the municipal corporation. This subject is treated in another part of this work.<sup>95</sup>

Officers are sometimes prohibited from becoming sureties on bonds of municipal officers and employees.<sup>96</sup>

Where the charter prescribes that an officer shall not have been convicted of malfeasance, bribery, "or other corrupt practices or crimes," the words relate to practices or crimes of the same class, namely, malfeasance in office or bribery; hence, one convicted of selling lottery tickets is not disqualified.<sup>97</sup>

92. *State v. Ruhe*, 24 Nev. 251, 52 Pac. 274; *State v. Von Baunback*, 12 Wis. 310.

93. *Bradwell v. Illinois*, 16 Wall. (U. S.) 130, 21 L. Ed. 442; *Huff v. Cook*, 44 Iowa 639; *Robinson's Case*, 131 Mass. 376; *State v. Gorton*, 33 Minn. 345, 23 N. W. 529.

94. *Jeffries v. Harrington*, 11 Colo. 191, 17 Pac. 505.

95. § 513 *post*.

**Contract with city.** Under a statute providing that no officer of any corporation having a contract with the city shall be eligible to city office, one elected to office is not ineligible if the disqualification existing at the time of his election is removed before the beginning of the term. *Hoy*

*v. State*, 163 Ind. 506, 81 N. E. 509.

96. **Officer cannot be surety in an official bond.** Held, under such provision that an officer is not liable who signs as surety. *Fond du Lac v. Moore*, 58 Wis. 170, 15 N. W. 782.

97. *State ex rel. v. Bersch*, 83 Mo. App. 657.

The rule is that where specific enumeration is followed by general words, the latter are restricted to things specifically mentioned. *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *St. Louis v. Bowler*, 94 Mo. 630, 633.

**Conviction of crime.** This disqualification held to refer alone to convictions under the state and not in the federal court. *Hildreth v. Heath*, 1 Ill. App. 82.

Other qualifications and requirements appear in the cases in the notes.<sup>98</sup>

98. Pledges of candidates for public office to the people as to fixing water rates does not disqualify them from acting as such officers when elected. *Spring Valley Water-works v. Bartlett*, 16 Fed. 615, 8 Sawyer C. C. 555.

Expulsion, as a member of a legislative body, when not a disqualification. *Tyrrell v. Jersey City*, 25 N. J. L. 536.

Oath and tests. Act held constitutional as containing provision that no oath, declaration or test shall be required for any office or public trust. *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887.

Officers increasing city's indebtedness. Under a statute providing that if the indebtedness of the city for a fiscal year is increased over the indebtedness of the preceding year without the consent of the electors, then the mayor and aldermen shall not succeed themselves or each other; where an alderman did not participate in the act creating such increase, and the ordinance creating it was passed before his induction into office, he is not ineligible to re-election. *State v. Cavett*, 78 Miss. 851, 29 So. 853.

Third terms forbidden—only two terms permitted. *Hall v. Hostetter*, 17 B. Mon. (56 Ky.) 784.

Defaulter. "No person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or

profit \* \* \* of any municipality \* \* \* until he shall have accounted for and paid over all the public money for which he may be accountable." Const. Mo. 1875, art. II, § 19.

Persons in default as collectors or custodians of money or property of the city. Ill. Const. IX, § 11.

Default defined in *State v. Moores*, 52 Neb. 770, 73 N. W. 299.

A civil service rule providing that the term of an eligible list shall be not less than one, nor more than four years, from the date of its establishment, does not violate a statute providing that "the term of eligibility shall be fixed for each eligible list at not less than one nor more than four years." *Golland v. Baker*, 102 N. Y. S. 721, 52 Misc. Rep. 187.

Requiring appointees to comply with civil service rules is not exacting an additional test within the meaning of the Constitution. *Rogers v. Buffalo*, 51 Hun (N. Y.) 637, 3 N. Y. S. 674.

As to discrimination between members of political parties relating to their eligibility to office, and civil service regulations, see *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274; *People v. Angle*, 109 N. Y. 564; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675; *People v. Crissey*, 91 N. Y. 616; *State ex rel. v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 79; *Evansville v. State ex rel.*, 118

### § 444. Same—residence.

Residence for a specified time within the municipal corporation is generally expressly required by charter or law applicable in order to render one eligible to hold municipal office.<sup>99</sup> An alien is not eligible to hold office.<sup>1</sup>

An ordinance cannot make eligible those who by charter, constitution or general laws applicable are not so. But in the absence of such provision one year's residence has been considered to render one competent to become an officer.<sup>2</sup>

Residence is usually held to be synonymous with domicile, denoting a permanent dwelling place to which the person when absent intends to return.<sup>3</sup>

Ind. 426, 4 L. R. A. 93, 21 N. E. 267; Opinion of Justices, 145 Mass. 587, 13 N. E. 15.

Appointee to be selected from two political parties, held directory. State v. Seavey, 22 Neb. 454, 35 N. W. 228. State v. Bennett, 22 Neb. 470, 35 N. W. 235.

Valid, Com. v. Plaisted, 148 Mass. 375, 12 Am. St. Rep. 566, 2 L. R. A. 142, 19 N. E. 224.

Rule forbidding police from soliciting funds for political purposes and from being members of political committees, etc., valid. McAuliffe v. New Bedford, 155 Mass. 216, 29 N. E. 517.

99. *Florida.* State v. George, 23 Fla. 585, 3 So. 81.

*Kentucky.* Hill v. Anderson, 28 Ky. Law Rep. 1032, 90 S. W. 1071.

*Massachusetts.* Barre v. Greenwich, 1 Pick. (Mass.) 129.

*Missouri.* State v. Williams, 99 Mo. 291, 12 S. W. 905.

*Ohio.* Scovill v. Cleveland, 1 Ohio St. 126.

*North Carolina.* State v. Hall, 111 N. C. 369, 16 S. E. 420.

Residence required, actual and

so to continue. People v. Ballhorn, 100 Ill. App. 571. Compare Allard v. Charlesbois, 14 Quebec Super. Ct. 310.

Residence in annexed territory. Meffert v. Brown, 132 Ky. 201, 116 S. W. 779, 1177.

1. State v. Smith, 14 Wis. 497.

2. State v. Blanchard, 6 La. Ann. 515; State v. Swearingen, 12 Ga. 23; Com. v. Jones, 12 Pa. St. 265.

3. People v. Platt, 117 N. Y. 159, 22 N. E. 937; State v. Grizard, 89 N. C. 115; Kempster v. Milwaukee, 97 Wis. 343, 72 N. W. 743.

"Inhabitants of the city." The word "inhabitant" means one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. State v. Kilroy, 86 Ind. 118; Cooley's Const. Lim. 66.

Legal residence or inhabitancy is the same as domicile. Crawford v. Wilson, 4 Barb. (N. Y.) 504.

Under a charter providing that "no person shall be eligible to any office who is not at the time of his election, a qualified voter of the city, and who has not resided therein three years preceding his election," previous residence of one elected to office, in territory annexed to a city is to be deemed residence within the city for the purpose of computing the period of residence necessary to make him eligible.<sup>4</sup>

The rule as to residence is further illustrated by the cases in the notes.<sup>5</sup>

### § 445. Same—residence in ward.

Under some laws the officer must be a resident for a named time of the ward or subdivision of the municipal

4. *Gibson v. Wood*, 105 Ky. 740, 43 L. R. A. 699, 20 Ky. Law Rep. 1547, 49 S. W. 768.

5. *Residents, removal from city, abandonment, when.* *State v. Williams*, 99 Mo. 291, 12 S. W. 905.

One who has been absent from the city for twenty-three months, returning within less than two years of the date of his election, is not eligible to the office of marshal. *State v. Williams*, 99 Mo. 291, 12 S. W. 905.

A person appointed trustee of an incorporated town, who is not a resident thereof is eligible under the statutes and constitution. *Hill v. Anderson*, 28 Ky. L. Rep. 1032, 90 S. W. 1071.

One who leaves his residence temporarily with intention to return does not cease to reside, etc. *Daubmann v. Camden*, 39 N. J. L. 57.

Qualification as to residence, refers to residence at the date of

election, and not to residence with respect to wards thereafter. *State v. Holman*, 58 Minn. 219, 59 N. W. 1006.

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment." *Const. Mo. 1875*, art. VIII, § 12. See observations of Barclay, C. J., in dissenting opinion in *State v. Valins*, 140 Mo. 523, 537, 41 S. W. 887.

Further as to residence affecting eligibility. See *Steusoff v. State*, 80 Tex. 428, 15 S. W. 100, 12 L. R. A. 364; *State v. Craig*, 132 Ind. 54, 31 N. E. 352, 16 L. R. A. 688, 32 Am. St. Rep. 237; *Fox v. MacDonald*, 101 Ala. 51, 13 So. 416, 21 L. R. A. 529; *Ky. Const.*, art. VIII, § 11; *Oregon Const.*, art. VI, § 8; *Colorado Const.*, art. XIV, § 10.



corporation that he represents or from which he is chosen. The cases in the notes fully illustrated this requirement.<sup>6</sup>

In the absence of legal provision to the contrary one a resident of the city for the time specified may be elected as an alderman or councilman of a ward in which he does not reside.<sup>7</sup>

### § 446. Same—elector or voter.

Under some laws the individual to be eligible to hold public office is required to be a qualified elector or voter

6. *Chateau v. Jacob*, 88 Mich. 170.

**Requirement as to residence**  
In ward applies to members of board of education, and the provision is mandatory. *People v. Board of Education*, 1 Denio (N. Y.) 647; *Com. v. Evans*, 102 Pa. St. 394.

The qualifications prescribed by statute providing that "no person shall be an alderman" unless he is a resident of the ward from which he is elected, and that no person shall be elected or appointed to a city office who is not a resident of the city, are held to apply to a holding of such office after election as well as the election to such office. *State v. Donworth*, 127 Mo. App. 377, 105 S. W. 1055.

A statute providing that cities of a certain class shall be divided into two or more wards and two aldermen shall be elected from each, by the votes thereof, is held to establish ward representation in the boards of aldermen of such cities, and to require aldermen to be residents of their wards at the

time of election and during the term of office. *State v. Donworth*, 127 Mo. App. 377, 105 S. W. 1055.

Under constitutional provisions declaring that every person entitled to vote at any election shall be eligible to any office elective by the people in the district where he resides, qualifications as to residence on particular streets, held invalid. *State v. Holman*, 58 Minn. 219, 59 N. W. 1006.

The constitution requiring that officers must be electors of the political divisions wherein the functions of their office are to be performed, the incumbent of an office not required to be an elector of the City of New Orleans cannot be made *ex officio* a member of a board whose functions relate exclusively to the city of New Orleans; and it makes no difference that the individual who, for the time being, is the incumbent of the office, happens to be an elector of the City of New Orleans. *State v. Kohnke*, 109 La. 838, 33 So. 793.

7. *Jones v. Mills*, 11 Ill. App. 350.

at the time of his election and for a named period prior thereto.<sup>8</sup> Some decisions consider it to be a fundamental principle of popular government, even in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office.<sup>9</sup> Failure to register does not affect his eligibility under this requirement.<sup>10</sup>

Laws rendering persons not naturalized ineligible to hold public office are usually construed as disqualifying such persons from being legally elected, and some decisions hold that, in view of such provision, one cannot render himself eligible by becoming a citizen after he is elected and before his term of office begins.<sup>11</sup> But the word "eligible," as used in laws prescribing the qualifications is sometimes construed as referring to the time of the commencement of the term for which the person is elected.<sup>12</sup>

This requirement is not ordinarily applied to mere employees in the municipal service.<sup>13</sup>

8. *Com. v. Lally*, 10 Phila. (Pa.) 507; *State v. Lake*, 16 R. I. 511; *State v. McGearry*, 69 Vt. 461, 44 L. R. A. 446, 38 Atl. 165.

9. *State v. Trumpf*, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489.

10. *Meffert v. Brown*, 132 Ky. 201, 116 S. W. 779, 1177.

11. *State ex rel. v. Sullivan*, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, citing *Searcy v. Grow*, 15 Cal. 117; *State v. Clarke*, 3 Nev. 566; *State v. McMillen*, 23 Neb. 385.

12. So construed in *Smith v. Moore*, 90 Ind. 294, followed in *Vogel v. State*, 107 Ind. 374, 5 West Rep. 546, by a divided court.

**Citizens only.** Where, in a charter of a town, the sole qualification requisite to a lawful holding of the office of mayor is that the persons shall have been a *bona fide* citizen of the town for two years next preceding his election the fact that one is not a qualified elector does not disqualify him for the office. *State v. Matthews*, 153 Ala. 646, 45 So. 307.

13. *Powell v. People*, 121 Ill. App. 474; *Baltimore v. Lyman*, 92 Md. 591, 48 Atl. 145.

Secretary of a town council need not be a voter, when. *Com. v. Newhart*, 7 Kulp (Pa.) 344.

§ 447. Same—property owner—free holder.

Laws sometimes prescribe property qualifications to hold municipal office. Such laws will be sustained, in the absence of restrictions in the state constitution.<sup>14</sup>

Some laws require the officer to be a freeholder. Under such laws the choice of one who is not a freeholder is void.<sup>15</sup> Under a charter providing that no one shall be eligible to the office of mayor unless he is a freeholder, a candidate for mayor who purchased a lot for the express purpose of making himself eligible was held to be a freeholder, though the deed was not recorded until after the election.<sup>16</sup> So under a charter providing that an alderman shall be a "resident and freeholder" in the ward for which he is elected, one, whose wife has an estate in fee simple, is *jure uxoris* owner of the freehold, and therefore eligible to the office of alderman.<sup>17</sup> Occupancy of land of the specified value as a copartner has been adjudged sufficient, to satisfy the law, in Canada.<sup>18</sup>

14. *State ex rel. v. Ruhe*, 24 Nev. 251, 52 Pac. 274.

A person who is one of the two members of a partnership assessed at \$2000 is not ineligible for the office of mayor under a statute rendering a person ineligible for mayor who is not assessed for real estate in the sum of \$1000 or more. *Vanneman v. Pusey*, 93 Md. 686, 49 Atl. 659.

Under a statute providing that a village trustee "must, at the time of his election, and during his term, be the owner of property assessed upon the last preceding assessment roll," a person who, at the time of his election, owns property which was assessed on such roll, though to another person, is eligible to the office of vil-

lage trustee. *People v. Davis*, 89 N. Y. S. 334, 43 Misc. Rep. 397.

Assessment roll held conclusive as to property qualification. *Reg. v. Rose*, 33 Can. L. J. (N. S.) 692.

15. *Spear v. Robinson*, 29 Me. 531.

Such a law is valid. *McMillin v. Neely*, 66 W. Va. 496, 66 S. E. 635.

16. *Pettit v. Yewell*, 113 Ky. 777, 24 Ky. L. R. 565, 68 S. W. 1075.

17. *State v. Russell*, 1 Tenn. Ch. App. 554.

"Taxpaying freeholder." *Mayer v. Sweeney*, 22 Mont. 103, 55 Pac. 913.

18. *Reg. v. Mason*, 23 Ont. (Can.) 495.

### § 448. Same—failure to pay taxes.

Under some laws failure to pay taxes in accordance with law, constitutes a disqualification to hold office.<sup>19</sup>

Where the constitution provides that, to entitle a person to qualify as a voter, he shall have paid a poll tax, the failure of one elected mayor to have paid such tax renders him ineligible to hold such office under the charter requiring that one, to be eligible to the mayoralty, must be a qualified voter under the state laws.<sup>20</sup>

Where the qualifications of a mayor and the members of the council of a municipal corporation are not prescribed by statute, such officers are not ineligible for the sole reason that they paid their state and county taxes for a given year after the time required by statute, but before execution for the taxes had been issued, without paying or tendering the interest on such taxes.<sup>21</sup>

### § 449. Same—educational qualifications.

In certain offices educational qualifications are prescribed.<sup>22</sup> Thus city solicitors, attorneys, councilors or

19. *Darrow v. People*, 8 Colo. 417, 8 Pac. 661.

The laws of Missouri, 1893, p. 70, § 25, provide that "no person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeitures or defalcation in office" which applies to cities of the third class. Held that the payment by a candidate of his delinquent taxes at 9 o'clock a. m., on the day of the election was made in time to render him eligible to office, "because at the time, he paid those taxes \* \* \* the election was then in progress, and was not over until the close of the polls on that day." *State on inf. Dearing v. Berkeley*, 140 Mo. 184, 187, 41 S. W. 732.

A receipt for taxes, in general form after the day of election, no sum being stated, or property mentioned, is worthless as evidence to show the candidate has paid his taxes. *State ex rel. Thomas v. Williams*, 99 Mo. 291, 12 S. W. 905.

One who pays after his election but before taking the office is eligible although the collector made an error in a small amount due which was not paid. *People v. Hamilton*, 24 Ill. App. 609.

20. *Frost v. State*, 153 Ala. 654, 45 So. 203.

21. *McWilliams v. Jacobs*, 128 Ga. 375, 57 S. E. 509.

22. *Test of qualifications. State v. Gyllstrom*, 77 Minn. 355, 79 N. W. 1038.

corporation counsels are usually required to be learned in law, or must have been licensed to practice law for a named time.<sup>23</sup>

Certain officers are required to be practical architects, builders, sanitary engineers, and to possess the technical requirements, education and experience, necessary to perform skilfully the duties of the office. The cases in the notes indicate some of these requirements.<sup>24</sup>

§ 450. Same—ceasing to possess the prescribed qualifications.

Under some laws, as judicially construed, ceasing to possess the legal qualifications works a forfeiture of the office. For example, ceasing to be an elector or voter of the municipal corporation,<sup>25</sup> as where officers reside in territory which has been legally detached from the local corporation which they serve and added to another municipal corporation,<sup>26</sup> or where aldermen or councilmen are required to be residents of wards or sub-

23. *People v. May*, 3 Mich. 598.

But where charter provides that all qualified voters are eligible to any municipal office, a city attorney need not be an attorney at law. *State v. Nichols*, 83 Minn. 3, 85 N. W. 717.

24. **Inspector of plumbing**, required to be a practical plumber, not merely an employing plumber. He must have such experience in the business as qualifies him to be an inspector and before commencing his duties he must obtain a certificate of competency from the examining board. *Stearns v. Tew*, 27 N. Y. S. 26, Misc. Rep. 404.

**Practical architect**. An ordinance requiring that building inspector be "a practical architect and sanitary engineer," is valid, under authority to regulate the

construction of buildings. *State v. Starkey*, 49 Minn. 503, 52 N. W. 24.

**Practical builder**. Charter of Buffalo requires building inspector to be a "practical building mechanic of not less than five years' experience in his trade." *People v. Buffalo*, 42 N. Y. S. 545, 18 Misc. Rep. 533.

**Civil officer**. Treasurer of a municipal corporation is not a "civil office in this state" within constitutional provision excluding the clergy from such office. *State v. Wilmington*, 3 Harr. (Del.) 294.

25. *Commonwealth v. Lally*, 30 Leg. Int. (Pa.) 296.

26. *People v. Highland Park*, 88 Mich. 653, 50 N. W. 660; *Ketcham v. Wagner*, 90 Mich. 271, 51 N. W. 281.

divisions of the city they thereby forfeit their office; that is, ordinarily such removal will be treated as an abandonment or implied resignation of the office;<sup>27</sup> but a temporary change of residence coupled with an intention to return will not.<sup>28</sup>

In an early Ohio case, it was ruled that under a charter requiring councilmen to reside in the wards for which they were chosen, a legal change of ward lines different from those existing when the councilmen were elected did not work a vacancy in such office.<sup>29</sup> But in Michigan under a charter expressly declaring that the office of aldermen shall become vacant by his removal from the ward from which he is elected it was held that a removal by change of ward boundaries worked a forfeiture of the office.<sup>30</sup>

It should be mentioned that the legal effect of the change of residence must be determined largely upon the proper construction to be given to the controlling law. Thus in an Indiana case, under a provision requiring a councilman to be a resident of the ward from which he is elected, and, providing that in case of removal therefrom the council shall have power to declare his office vacant and order a special election to fill the vacancy, it was held properly that, the mere removal of a councilman to another ward will not create a vacancy, since, in the

27. *Illinois*. *People v. Ballhorn*, 100 Ill. App. 571.

*Massachusetts*. *Barre v. Greenwich*, 1 Pick. (Mass.) 129.

*Missouri*. *State v. Donworth*, 127 Mo. App. 377, 105 S. W. 1055.

*New Hampshire*. *Rumney v. Compton*, 10 N. H. 567; *Giles v. School Dist.*, 31 N. H. 304.

*New York*. *People v. Hull*, 64 Hun (N. Y.) 638, 19 N. Y. S. 536.

*Pennsylvania*. *Com. v. Yeakel*, 13 Pa. Co. Ct. Rep. 615; *Com. v. Lally*, 30 Leg. Int. (Pa.) 296;

*Com. v. James*, 214 Pa. St. 319, 63 Atl. 743.

28. *People v. Met. Police Board*, 19 N. Y. 188; *Van Orsdal v. Hazard*, 3 Hill (N. Y.) 243; *Lyon v. Commonwealth*, 3 Bibb. (Ky.) 430; *Hannon v. Grizzard*, 39 N. C. 115.

29. *Scovill v. Cleveland*, 1 Ohio St. 126.

30. *Ross v. Barber*, 86 Mich. 380, 49 N. W. 35.

A like ruling in *State v. Orr*, 61 Ohio St. 384, 56 N. E. 14.

opinion of the court, the right to declare such vacancy was within the discretion of the council as a body.<sup>31</sup>

### § 451. Same—officer cannot hold two offices.

Charters and laws usually provide that the officer cannot hold two offices at the same time.<sup>32</sup> For example,

31. *State v. Craig*, 132 Ind. 54, 32 Am. St. Rep. 237, 16 L. R. A. 688, 31 N. E. 352.

Removal. Remedy by statute allowing tax payer to file petition to have office declared vacant where officer does not continue to possess all prescribed qualifications does not apply where the councilman was not qualified when elected. *Kean v. Rizer*, 90 Md. 507, 45 Atl. 468.

32. *Long v. Rose*, 132 Ga. 288, 64 S. E. 84; *People v. Blake*, 144 Ill. App. 246; *State v. Carroll*, 57 Wash. 202, 106 Pac. 748.

**Officer cannot hold two offices.** Under the Nebraska statute governing certain cities of the second class, the offices of chief of police and overseer of streets are separate or separable although both may be held by one person at the same time. *Mead v. State*, 73 Neb. 754, 103 N. W. 433.

A night watchman in a federal postoffice is eligible to hold the office of alderman, as the position of night watchman is not an office of trust or profit under the United States. *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677.

A charter provision forbidding the councilmen to be elected to any other office is valid. *State v. Von Baumbach*, 12 Wis. 310.

A member of the board of health of a municipal corporation is an

officer of such corporation and ineligible to the appointment of district physician during the term for which he was appointed or for one year thereafter. *State v. Wichgar*, 27 Ohio Cir. Ct. R. 743.

The inhibition of the Ohio statute against councilmen holding other office or employment is not limited to office in or employment by the municipality, but extends to all public offices and employment, not excepted in the statute. *State v. Gard*, 29 Ohio Cir. Ct. R. 426, affirmed, 75 Ohio St. 606, 80 N. E. 1133.

Mayor, when a judicial officer, is not eligible to hold another judicial office. *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49.

Retired army officer, held eligible for municipal office. *People v. Duane*, 121 N. Y. 367, 24 N. E. 845.

The election to the office of councilman of a person who holds the office of county school examiner and is also a teacher in the public schools contravenes the statute prohibiting councilmen from holding public office or employment, and is therefore a nullity. *State v. Gard*, 29 Ohio Cir. Ct. R. 426, affirmed, 75 Ohio St. 606, 80 N. E. 1133.

City surveyor not getting salary from city is not officer as to forbidding his holding office of as-

that no person shall at the same time be a state officer and an officer of any city, or town and no person shall at the same time fill two municipal offices either in the same or different municipalities; but the restriction does not usually apply to notaries public, justices of the peace or officers of the militia.<sup>33</sup> And that a municipal officer, especially a member of a legislative body, is ineligible to become a member of the legislature of the state, or hold a state office.<sup>34</sup>

sistant engineer. *Wardlaw v. New York*, 29 Jones & S. (61 N. Y. Super. Ct.) 174, 19 N. Y. S. 6.

See *Forman v. Bostwick*, 139 N. Y. App. Div. 333, 123 N. Y. S. 1048.

One holding an elective office may be appointed to another, when. *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

Various illustrations of what are officers within the meaning of law forbidding holding two offices. *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891; *People v. Drake*, 60 N. Y. Supp. 309, 43 N. Y. App. Div. 325, affirmed in 161 N. Y. 642, 57 N. E. 1122; *State v. McMillan*, 15 Ohio Cir. Ct. 163, 8 Ohio Cir. Dec. 380; *State v. Wichgar*, 27 Ohio Cir. Ct. 743; *Com. v. Ford*, 5 Pa. St. 67; *Com. v. Bohan*, 10 Kulp (Pa.) 80; *Com. v. Shoener*, 1 Leg. Chron. (Pa.) 177.

Lucrative office is one where compensation is given for the performance of the duties thereof. *Chambers v. Barnard*, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613; *Foltz v. Kerlin*, 105 Ind. 221, 4 N. E. 439; *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *Kerr v.*

*Jones*, 19 Ind. 351; *Dailey v. State*, 8 Blackf. (Ind.) 329.

33. Constitution of Mo. 1875, art. IX, § 18.

A member of the general assembly cannot be appointed to a municipal office. *State ex rel. v. Valle*, 41 Mo. 29. See *State ex rel. v. Draper*, 45 Mo. 355.

As to when "two municipal offices" are not involved, see *State ex rel. v. Mason*, 4 Mo. App. 377; *State v. Merry*, 3 Mo. 278.

This provision does not prevent one from holding the office of city attorney and that of court commissioner. *Goodloe v. Fox*, 96 Ky. 627, 29 S. W. 433, 16 Ky. L. Rep. 653.

34. Constitution of Mo. 1875, art. IV, § 12; *State ex rel. v. Draper*, 45 Mo. 355; *State ex rel. v. Valle*, 41 Mo. 29; *People v. State Board*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

What are not offices, see *Goodloe v. Fox*, 96 Ky. 627, 16 Ky. Law Rep. 653, 29 S. W. 433; *Olmstead v. New York*, 42 N. Y. Super. Ct. 481; *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *Com. v. Binns*, 17 Serg. & R. (Pa.) 219.



Laws often provide that councilmen and aldermen shall be ineligible during their term of office to hold any other municipal office. Under such law it was held in Georgia that the words "councilmen and aldermen" do not include the mayor, and, hence, such officer might become a school commissioner, in the absence of a law forbidding it.<sup>35</sup>

Where a law provides that no member of the council shall during the period for which he is elected be eligible to hold any other office of which the emoluments are paid by the city, a councilman cannot be chief of police during his term, where paid by the city.<sup>36</sup>

One holding the office of councilman may be elected to the office of mayor, and acceptance of the latter office vacates the former.<sup>37</sup>

Under a statute providing that the acceptance by one in office of another office incompatible with the one he holds shall operate to vacate the first, an acceptance, by a city councilman, of the office of member of the county board of health, vacates the office of councilman.<sup>38</sup>

A fireman wrongfully discharged who accepts employment as sergeant at arms to the city council pending his reinstatement, does not thereby forfeit his right to the office of fireman within the charter prohibiting municipal officers from holding two offices.<sup>39</sup>

35. *Akerman v. Ford*, 116 Ga. 473, 42 S. E. 777. See *Reg. v. Haggart*, 1 Can. L. J. (N. S.) 74.

36. *Ellis v. Lemmon*, 86 Mich. 468, 49 N. W. 308.

37. *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869.

Membership in the council is not a disqualification to election of such member to the vacant office of mayor. *Com. v. Corcoran* (Pa.), 9 Kulp. 507.

An officer accepting a position in the United States army for-

feits his position, although he was granted leave of absence by the city, and notwithstanding a council resolution that employees enlisting in the service should not lose their positions. *People v. Drake*, 60 N. Y. S. 309, 43 App. Div. 325.

See *Bryan v. Cattell*, 15 Iowa 538; *People v. Hanifan*, 96 Ill. 420.

38. *Vickers v. Sory*, 31 Ky. L. R. 277, 102 S. W. 272.

39. *Padden v. New York*, 92 N. Y. S. 926, 45 Misc. Rep. 517.

### § 452. Same—incompatible offices.

The common-law rule is that the acceptance by a public officer of another office which is incompatible with the first thereby vacates the first office; that is, the mere acceptance of the second incompatible office *per se* terminates the first office, as if by resignation.<sup>40</sup>

Whether the offices involved are incompatible is a judicial question. Incompatibility refers to inconsistency in the functions of the respective offices; that is, conflicting duties to be performed by the officer. As expressed in a New York case: "The force of the word in its application to this matter is that from the nature and relations to each other of the two places they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to discharge faithfully and impartially the duties of one toward the incumbent of another."<sup>41</sup>

The offices following have been declared to be incompatible: governor of the state and mayor of a municipal corporation;<sup>42</sup> secretary of state and a recorder of a city or town;<sup>43</sup> city marshal and councilman;<sup>44</sup> alderman and representative in congress;<sup>45</sup> clerk of city or town and township supervisor;<sup>46</sup> jurat and town clerk;<sup>47</sup>

40. *Milward v. Thatcher*, 2 T. R. 81, 7 Eng. Rul. Cas. 320; *Rex v. Patteson*, 4 B. & Ad. 9; *Rex v. Patman*, 2 T. R. 777; *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782; *People v. Duane*, 121 N. Y. 367, 24 N. E. 845; *People v. Drake*, 60 N. Y. S. 309, 43 N. Y. App. Div. 325, affirmed in 161 N. Y. 642, 57 N. E. 1122; *People v. Carrique*, 2 Hill (N. Y.) 93; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Mechem, Public Off.*, § 420.

41. *People v. Green*, 58 N. Y. 295.

Further as to incompatible offices, see *State v. Draper*, 45 Mo. 355; *De Turk v. Com.*, 129 Pa. St. 151, 5 L. R. A. 853, 15 Am. St. Rep. 705, 18 Atl. 757.

42. *Attorney General v. Detroit*, 113 Mich. 388, 71 N. W. 632.

43. *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

44. *State v. Hoyt*, 2 Or. 246.

45. *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659.

46. *Northway v. Sheridan*, 111 Mich. 118, 69 N. W. 82.

47. *Milward v. Thatcher*, 2 T. R. 81, 7 Eng. Rul. Cas. 320.

trustee of township and postmaster;<sup>48</sup> county judge and postmaster;<sup>49</sup> justice of the peace and sheriff;<sup>50</sup> justice of the peace and deputy sheriff;<sup>51</sup> justice of the peace and constable;<sup>52</sup> justice of the peace and state treasurer;<sup>53</sup> member of prudential committee and school auditor;<sup>54</sup> representative in the legislature and a governor.<sup>55</sup>

The same person may hold different offices which are not incompatible, unless forbidden by law.<sup>56</sup> It has been ruled that these are not incompatible offices: court clerks and court commissioner;<sup>57</sup> court clerk and member of the legislature;<sup>58</sup> court crier and court messenger;<sup>59</sup> clerk of different courts, e. g., circuit and county;<sup>60</sup> judge of election and school director;<sup>60a</sup> member of a board of education and a deputy sheriff.<sup>61</sup>

#### 5. MANNER OF SECURING OFFICE AND PUBLIC PLACE—ELECTION OR APPOINTMENT—TESTING TITLE—QUALIFYING, ETC.

### § 453. Manner of conferring office.

There are two legal modes of conferring office. Whenever the office is to be conferred by the people, or by any considerable body of the people, it is spoken of as an

48. *Foltz v. Kerlin*, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197.

49. *Hoglan v. Carpenter*, 4 Bush. (Ky.) 89.

50. *Stubbs v. Lee*, 64 Maine 195, 18 Am. Rep. 251.

51. *State v. Goff*, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921.

52. *Macie v. Stoddard*, 25 Conn. 375.

53. *State v. Huff*, 2 Ark. 282.

54. *State v. Phillips*, 56 N. H. 220.

55. *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304.

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56. *Badeau v. United States* 130 U. S. 439, 9 Sup. Ct. 579, 32 L. Ed. 997; *Converse v. United States*, 21 How. (U. S.) 463, 470, 16 L. Ed. 192.

57. *Kenney v. Goergen*, 36 Minn. 190, 31 N. W. 210.

58. *People v. Green*, 58 N. Y. 295.

59. *Preston v. United States*, 37 Fed. 417.

60. *State v. Lusk*, 48 Mo. 242.

60a. *In re District Attorney*, 11 Phila. (Pa.) 645.

61. *State v. Bus*, 135 Mo. 325, 33 L. R. A. 616, 36 S. W. 636.

election. Whenever it is to be conferred by an individual, as by the governor, or by a select number of individuals, as by a judicial court, or by the general assembly, or a municipal council or board it is usually spoken of as an appointment.<sup>62</sup>

If the law directs an officer to be "elected," an appointment is void, since an appointment to an office is not an election to an office.<sup>63</sup>

The words "choose," "select," "appoint," and "elect," are often used interchangeably.<sup>64</sup>

#### § 454. Authority to appoint to office or situation in the public service.

There can be no appointment of an officer or employee in the public service without legal authority.<sup>65</sup> If the appointment is unauthorized, ordinarily no subsequent declaration by municipal officers can validate it.<sup>66</sup>

The right to appoint the officer or employee must clearly appear. It cannot be implied from the fact that the mayor who seeks to appoint is the chief executive

62. *State ex rel. v. McCollister*, 11 Ohio 46, 52.

63. *Speed v. Crawford*, 3 Met. (Ky.) 207.

64. **Election or appointment.** "Appointed" as used in a constitution forbidding a state senator from being appointed to another office, held not to prohibit "election" to another office. *Carpenter v. People*, 8 Colo. 116, 129, 5 Pac. 828.

Where a mode prescribed for selection of officers is, in legal effect an appointment, the use of the word "elected" is immaterial. *Sttirgis v. Spofford*, 45 N. Y. 446, 449.

**Election equivalent to appointment.** In the New York City charter (Laws 1901, p. 161, ch. 466),

§ 382, the word "election" is equivalent to the word "appointment" as used in the part thereof providing that any vacancy in the office of borough president caused by removal from the borough or otherwise shall be filled for the unexpired term by an election to such vacancy made by a majority of all the members of the board of aldermen of such borough. *People v. Ahearn*, 113 N. Y. S. 876, 60 Misc. Rep. 613; *People v. Ahearn*, 196 N. Y. 221, 226, 241, 89 N. E. 930.

65. *Beresford v. Donaldson*, 103 N. Y. S. 600, 54 Misc. Rep. 138; *White v. Tallman*, 26 N. J. L. (2 Dutch) 57.

66. *People v. Partridge*, 78 N. Y. S. 249, 38 Misc. Rep. 697.

officer. The power must appear from the charter or a legislative act applicable. This power is usually regarded as one of the prerogatives of sovereignty.<sup>67</sup>

67. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *State v. Swift*, 11 Nev. 128; *Collins v. State*, 8 Ind. 344.

**Power to appoint—illustrations.** Power of coroner to appoint physician. Expiration of term. *People v. Goldenkranz*, 78 N. Y. S. 267, 38 Misc. Rep. 682.

Sanitary inspectors, held to be officers. *Stoddard v. New York*, 80 N. Y. S. 344, 80 App. Div. 254.

Under a statute establishing a charter conferring upon the mayor and aldermen power to create such offices and appoint such officers as may be necessary for corporate purposes, and to regulate and control them in the discharge of their duties, the mayor and aldermen have power to elect or appoint a city treasurer. *Somerville v. Wood*, 129 Ala. 369, 30 So. 280.

Necessary to be shown to entitle incumbent (alleged) to fees of office of boiler inspector. *House Ins. Co. v. Tierney*, 47 Ill. 600.

Right of officers to hold office on change of class. *Gilbert v. Paducah*, 24 Ky. Law Rep. 1998, 72 S. W. 816; *Crow v. Paducah*, 24 Ky. L. Rep. 1998, 72 S. W. 816.

"There is no implied power in a municipal council to employ persons to do work outside of duties germane to the city government." The city charter of Cape May held not to authorize the appointment by the council of an officer to advertise the city, in a general way, "as a resort before the people at large." *State v. Cape May*, 66 N. J. L. 544, 49 Atl. 584.

Direct and exclusive legislation conferring the power to appoint, not essential. *State v. Ehrmentraut*, 63 Minn. 104, 65 N. W. 251.

Sometimes power to perform specified duties will be held as authority to appoint the required officers and employees for this purpose. *Union Pac. R. R. Co. v. Ryan*, 2 Wyo. 408.

The employment of a city engineer rests in the sound discretion of the city council, subject to judicial review for abuse of discretion. *Decatur v. McKean*, 167 Ind. 249, 78 N. E. 983.

Where authority for the election of a captain of police is contained in the city code, the enactment of an additional ordinance by the council for the purposes is not necessary. *Huey v. Jones*, 140 Ala. 479, 37 So. 193.

**Conflict in laws.** Where the prefatory synopsis of a charter declares that the office of district attorney shall be elective and the charter provides that the heads of departments of which such attorney is one shall be appointed, the latter will prevail. *People v. Lindsley*, 37 Colo. 476, 86 Pac. 352.

An ordinance providing that the city treasurer shall have charge of the department of delinquent taxes cannot affect the validity of an appointment to the office of collector of delinquent taxes made prior to the passage of such ordinance. *Jenkins v. Servanton*, 202 Pa. 267, 51 Atl. 994.

Charters and laws vary as to what department or officer may exercise the power of appointment, as will appear from the numerous cases in the note.<sup>68</sup>

**68. Boards—officers.** Power to appoint officers and employees of board of works under particular provisions. *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660.

Power to appoint street commissioners. *Eaton v. Burke*, 66 N. H. 306, 22 Atl. 452.

Under the constitution and statutes of Kentucky the execution boards of cities of the first class have authority to appoint a chief of each department under their control, and to empower the board of public works to appoint a chief engineer. *Parsons v. Breed*, 31 Ky. L. Rep. 1136, 104 S. W. 766.

**Clerks.** Where charter and statute laws provide for the election of a certain number of coroners in each borough of the city, and that the coroners in each borough shall have an office in said borough and shall appoint a clerk, it is held to authorize the appointment of only one clerk by all the coroners in the borough. *In re McNiele*, 95 N. Y. S. 146, 107 App. Div. 338; *In re Phillips*, 95 N. Y. S. 146, 107 App. Div. 338.

Commissioners of estimate appointed under charter to acquire lands by condemnation proceedings have authority to appoint their own clerk. *In re Board of Public Improvements, etc.*, 77 N. Y. S. 1078, 38 Misc. Rep. 371.

A statute prohibiting the superintendent of public works from making certain appointments, until the number and compensation.

of the appointees shall have been fixed by ordinance, confers upon such superintendent power to make such appointments. *Board of Aldermen v. Covington*, 33 Ky. L. Rep. 880, 111 S. W. 1007; *Covington v. Ranshaw*, 33 Ky. L. Rep. 880, 111 S. W. 1007.

**Market master.** A statute conferring upon the superintendent of public works control and supervision of the city market houses does not authorize the board of public works to appoint a market master. *Potter v. Bell*, 125 Ky. 288, 30 Ky. L. Rep. 1314, 101 S. W. 297.

**Town in two counties.** The power and jurisdiction to appoint trustees of a town lying in two counties is concurrent in the two counties, and the one first exercising the power has the authority to appoint. *Yancy v. Fairview et al.*, 23 Ky. L. Rep. 2087, 66 S. W. 636.

A city library board has authority to appoint its own treasurer, and the city treasurer is not *ex officio* treasurer of the board. *Board of Trustees, etc. v. Beitzer*, 26 Ky. L. Rep. 611, 82 S. W. 421.

**Schools.** "The power to nominate persons for the position of teachers is vested solely in the superintendent of instruction, and the power to ratify or reject nominations made by him rests with the board of education." *Wetmore v. Board of Education, etc.*, 86 Mo. 362.

In the absence of constitutional restrictions it is sometimes held that the governor of the state may appoint certain municipal officers;<sup>69</sup> however, the decisions, as pointed out elsewhere, are not entirely uniform on this subject.<sup>70</sup> In the absence of such constitutional restrictions state laws have been sustained authorizing the legislature of the state to exercise the power of appointing municipal officers, either by naming the officer in the act creating the office or by providing the manner in which such officer shall be chosen.<sup>71</sup> Some cases deny this power.<sup>72</sup>

Under a constitution providing that offices shall be filled by appointment by such authorities as the legislature may designate a statute authorizing the mayor to appoint a local officer is not rendered unconstitutional by a power therein given to the governor to remove such officer.<sup>73</sup>

The power to appoint an officer confers upon the appointing power the right of deciding the question of the competency of applicants for the services to be performed.<sup>74</sup>

Cities have power to employ a superintendent of schools under California laws. *Davidson v. Baldwin*, 2 Cal. App. 733, 84 Pac. 238.

69. By governor and not council. *Michel v. Campbell*, 25 La. Ann. 340.

Power of legislature to authorize governor to appoint. *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *Ex parte Lewis*, 45 Tex. Cr. App. 1, 73 S. W. 811.

*Contra.* *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488..

70. § 176 *et seq. ante*.

71. *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

72. § 176 *et seq. ante*.

73. *People v. Coler*, 76 N. Y. S. 205, 71 App. Div. 584.

**Constitutional and legislative officers.** The provision of the New York Constitution requiring that "the legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy," is held to apply only to constitutional offices as distinguished from those created by the legislature. *People v. Schen*, 167 N. Y. 292, 60 N. E. 650.

74. *State v. Addison*, 78 Kan. 172, 96 Pac. 66.

Sometimes the power of appointment is not a continuing power, but is exhausted by a single performance thereof.<sup>75</sup>

Where the manner of appointment and the term of officer are prescribed by law these need not be expressed in the nomination.<sup>76</sup>

### § 455. Same—only by the authority named.

Where the charter confers upon the council the power to appoint and remove certain subordinates, it is clear that an ordinance conferring this power upon the mayor and council is void.<sup>77</sup> Thus where the municipal charter provides that an appointment can only be made by the council an ordinance providing that it may be made by the mayor and council is void.<sup>78</sup>

It is equally clear that if the charter confers the power of appointment upon the council and mayor, the ordinance creating the office cannot confer the power upon the council alone.<sup>79</sup> So where the law requires a vacancy to be filled by the mayor and board of aldermen, such vacancy cannot be filled by the mayor alone on the ground that public policy requires it.<sup>80</sup> The power of the council

75. *People v. Woodruff*, 32 N. Y. 355, 29 How. Pr. (N. Y.) 203, reversing, 42 Barb. 203.

76. *Commonwealth v. Swacy*, 133 Mass. 538.

**No appointment.** Ordering a street sweeper to act as an assistant foreman is only a detail in the department and not an appointment, under New York laws. *People v. Woodbury*, 78 N. Y. S. 362, 75 App. Div. 503.

77. *State v. Newark*, 47 N. J. L. 117.

78. "No such power or any part of it can be conferred on the mayor by ordinance under the

statute." *State ex rel. v. Johnson*, 123 Mo. 43, 50, 27 S. W. 399; *O'Connor v. Walsh*, 82 N. Y. S. 499, 83 App. Div. 179.

79. *Com. v. Crogan*, 155 Pa. St. 448, 26 Atl. 697.

80. *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874.

The action of the board of aldermen in authorizing a person to perform the duties of health officer, and to receive the compensation therefor, amounts to an appointment without the concurrence of the mayor, and is illegal. *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874.



to select officers may be transferred by statute to the mayor unless forbidden by the state constitution.<sup>81</sup>

§ 456. Same—delegation of power to elect or appoint, forbidden.

Delegation or surrender of powers conferred on officers or departments is forbidden. This subject is treated elsewhere.<sup>81a</sup> This rule applies to the election or appointment of municipal officers and subordinates. Where the charter gives the council powers to impose on its officers duties other than those prescribed by law it has no power to confer on one officer powers or duties imposed upon another officer, without express legal authority.<sup>82</sup> However, the principle does not forbid the council from delegating to its clerk power to perform ministerial acts, as that of issuing and collecting licenses imposed by ordinance.<sup>83</sup>

Under the rule as stated, if the charter confers power on the council to appoint or elect a chief engineer the power cannot be delegated.<sup>84</sup> So the council cannot delegate power vested in this body to appoint an attorney to the mayor.<sup>85</sup>

But the selection upon the recommendation by a business organization, for example, a chamber of commerce, of an inspector and sealer of weights and measures is not a delegation of the power to appoint.<sup>86</sup>

81. Attorney-General v. Var-num, 167 Mass. 477, 46 N. E. 1.

81a. § 383 *ante*.

82. Board v. Decatur, 64 Tex. 7, 53 Am. Rep. 735.

83. Ex parte Guerrero, 69 Cal. 88, 10 Pac. 261.

84. State ex rel. v. Atlantic City, 63 N. J. L. 537, 42 Atl. 852.

85. East St. Louis v. Thomas, 11 Ill. App. 283.

Delegation to superintendent of police is forbidden. People v. McCann, 247 Ill. 130, 143, 93 N. E. 100.

Board of public work may confer power to employ and discharge men—when not delegation. Hathaway v. Des Moines, 97 Iowa 333, 66 N. W. 188.

86. State v. Cincinnati, 11 Ohio St. 544.

Law may provide for the appointment of a board of fire commissioners by a board of underwriters composed of agents of the various companies doing business in the state. In re Bulger, 45 Cal. 553.

### § 457. Same—by mayor.

Some charters vest in the mayor as the chief executive officer of the city exclusive power of appointment;<sup>87</sup> others require the consent or confirmation of the council.<sup>88</sup>

Many students of municipal government advocate that the mayor should have the unrestricted power to appoint the heads of departments and chief officers, and, also, the unrestricted power to remove them at pleasure.<sup>89</sup>

When the appointment is made by the president of the council acting as mayor, where the law prescribes that the mayor shall make the appointment, it must affirmatively appear that the president had the right to make the appointment.<sup>90</sup>

An appointment made by one illegally elected mayor *pro tem* by the council, is void.<sup>91</sup>

87. *People v. Lindsley*, 37 Colo. 476, 86 Pac. 352; *Speed v. Detroit*, 97 Mich. 198, 56 N. W. 510; *Attorney-General v. Corliss*, 98 Mich. 372, 57 N. W. 410; *In re Building Inspectors*, 17 R. I. 819, 21 Atl. 913; *People v. Lacombe*, 99 N. Y. 43, 1 N. E. 599.

**Engineer.** The mayor of St. Joseph has authority under an ordinance to appoint a person to the office of city engineer created by statute. *Sales v. Barber Asph. Pav. Co.*, 166 Mo. 671, 66 S. W. 979.

88. *Whipple v. Henderson*, 13 Utah 484, 45 Pac. 274; § 466 *post*.

89. §§ 93, 335 *ante*.

90. *State (Clarke) v. Thornton*, 49 N. J. L. 349, 8 Atl. 509.

Mayor *pro tem* may appoint. *People v. Van Anden*, 116 Mich.

54, 74 N. W. 1009; *State v. Byrne*, 98 Wis. 16, 73 N. W. 320.

President of board of aldermen who acts as mayor in the latter's absence cannot appoint officers. *Watkins v. Mooney*, 114 Ky. 646, 24 Ky. L. Rep. 1469, 71 S. W. 622.

91. *People v. Blair*, 82 Ill. App. 570, affirmed in *Blair v. People*, 109 Ill. 504, 54 N. E. 1024.

Charter required mayor to preside at council meetings and in his absence council had power to elect mayor *pro tem*. Mayor sent nomination to council. Mayor was not present and council appointed a mayor *pro tem*. Mayor's nomination was rejected, and nomination by mayor *pro tem* was confirmed. This was held legal. *Mills v. State*, 2 Wash. 566, 27 Pac. 560.

Council elects chief of police. *Price v. Brock*, 79 N. C. 600.

Mayor's power to appoint chief of police. *State v. Kizer*, 14 Wash. 185, 44 Pac. 156.

If the law authorizes the officer or the heads of departments to appoint their own assistants and subordinates the power of selection cannot be exercised by the mayor.<sup>92</sup>

§ 458. Charters often prescribe that the council or common council shall have power to appoint or elect certain municipal officers.<sup>93</sup>

Since the power of appointment to office is not essentially an executive function, it may therefore, in the absence of constitutional restriction, be vested in departments other than the executive.<sup>94</sup> But if the officer is required to be elected by the people, it is clear that the

92. *Peters v. Bell*, 51 La. Ann. 1621, 26 So. 442.

Officer's power to appoint his subordinates. The mayor as head of the department of public health and safety, has no power, under charter providing that subordinates shall be appointed by the heads of the departments to appoint an assistant to the commissioner of inspection, when another section of the charter authorizes the commissioner to appoint his own assistants. *Cutshaw v. Denver*, 19 Colo. App. 341, 75 Pac. 22.

93. *Price v. Brock*, 79 N. C. 600; *Kirkham v. Russell*, 76 Va. 956; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *Com. v. Pittsburgh*, 14 Pa. St. 177, 182; *Russell v. Chicago*, 22 Ill. 283; *Wilder v. Chicago*, 26 Ill. 182; *Rouley v. People*, 53 Ill. App. 298; *Baker v. Police Commissioners*, 62 Mich. 327, 28 N. W. 913.

Appointing, special case, repealing laws, etc. *Sales v. Barber Asphalt P. Co.*, 166 Mo. 671, 66 S. W. 979.

**Clerks.** A charter authorizing the city council to provide for the

employment of such clerks and other persons in any of the city departments as the public service may require, is applicable only to cases concerning which there is an absence of provisions in the charter. *Cutshaw v. Denver*, 19 Colo. App. 341, 75 Pac. 22.

Council has power to appoint its clerk. *State ex rel. v. Poucher*, 98 Mo. App. 109, 71 S. W. 1125.

**Page.** The appointment of a page to the council made, by the mayor under authority of the city council, in the absence of charter provision authorizing such appointment, is invalid. *O'Connor v. Walsh*, 82 N. Y. S. 499, 83 App. Div. 179.

Election by council, vote required, see chapter 13 *post*.

**England.** Under the English Municipal Corporation Act, the council appoints the officers. 45 and 46 Vict. c. 50, §§ 18, 19; *Arnold's Mun. Corp.* (5th Ed., London), pp. 38 to 41.

94. *Atty. Gen. ex rel. v. Bolger*, 128 Mich. 355, 8 Det. Leg. N. 675, 87 N. W. 366.

council has no right to make the appointment of the officer under the general power to appoint all municipal officers.<sup>95</sup> A statute providing that the council shall elect all officers of the city not required to be otherwise elected or appointed, was construed to mean officers "not required by the charter to be otherwise elected" or appointed.<sup>96</sup>

A provision in a city charter conferring upon its council authority "to appoint policemen and prescribe their duties, and powers and compensation," was held self-executory and required no resolution or ordinance to make it effective.<sup>97</sup>

A charter provision authorizing the city to provide for the employment of such clerks and other persons as the exigencies of the public service may demand is applicable only to cases concerning which there is an absence of provision in the charter.<sup>98</sup>

Where laws provided that the board of council shall fill a vacancy in the office of police judge, and a different section authorizes the governor to fill a vacancy in such office "where there is no provision of law for filling the same," the board of council had the right to fill a vacancy in such office.<sup>99</sup>

The power conferred by charter on a civil service commission to discharge and appoint, is not in conflict with a charter provision empowering the council to establish and regulate a police and a fire department.<sup>1</sup>

Ordinarily, it is held that the legislature may confer power upon the municipal council to appoint administrative officers.<sup>2</sup>

95. *State v. Gorman*, 13 R. I. Ky. 13, 74 S. W. 1105, 76 S. W. 318.

96. *Lowry v. Lexington*, 24 Ky. 1. *Callaghan v. Irvin*, 40 Tex. L. Rep. 516, 68 S. W. 1109. Civ. App. 453, 90 S. W. 335.

97. *Paris v. Cabiness*, 44 Tex. 2. Council may appoint administrative officers. In the absence

98. *Cutshaw v. Denver*, 19 Colo. App. 341, 75 Pac. 22. of constitutional restrictions a statute authorizing the city council of Detroit to appoint a com-

99. *Traynor v. Beckham*, 116

### § 459. Appointment of police officers.

As police officers are usually regarded state officers the power to create a police force for local governmental areas and to appoint or provide for the appointment of the officers and members thereof, is a state power and such power is generally exercised by the state.<sup>3</sup> A charter provision for the appointment of a chief of police and policemen by commissioners appointed by the governor is not unconstitutional, in Texas.<sup>4</sup>

In some jurisdictions the local authorities are authorized to appoint policemen.<sup>5</sup> Under a charter authorizing the council to establish and support night watches an ordinance providing for the appointment of policemen by the mayor subject to the approval of the council is authorized.<sup>6</sup> Under a statute authorizing the board of aldermen of a town to appoint such officers as it shall deem necessary, such board may appoint policemen.<sup>7</sup>

missioner of parks and boulevards is valid. *Atty. Gen. ex rel. v. Bolger*, 128 Mich. 355, 8 Det. Leg. N. 675, 87 N. W. 366.

A constitutional provision that "the legislative power is vested in a senate and house of representatives" does not invalidate an act of the legislature conferring power upon the city council to appoint an administrative officer. *Atty. Gen. ex rel. v. Bolger*, 8 Det. Leg. N. 675, 87 N. W. 366.

A statute which undertakes to make certain officers members *ex officio* of a sewerage and water board, without the election of such officers by the city council, is unconstitutional in Louisiana. *State v. Kohnke*, 109 La. 838, 33 So. 793.

3. § 181 *ante*.

4. *Ex parte Tracey* (Tex. Cr. Rep. 1906), 93 S. W. 538.

5. *People v. Partridge*, 78 N. Y. S. 249, 38 Misc. Rep. 697.

6. *State v. Grabarkiewicz*, 88 Minn. 16, 92 N. W. 446.

7. *Early v. State*, 50 Tex. Cr. Rep. 344, 97 S. W. 82.

**Appointment of policemen.** The commissioners of the board of public safety of the City of Louisville are authorized by statute to appoint special police to do special duty. *Louisville v. Young*, 23 Ky. L. Rep. 1429, 65 S. W. 599.

The board of police and fire commissioners has power under the charter of San Antonio to appoint mounted policemen. *San Antonio v. Beck* (Tex. Civ. App.), 101 S. W. 263; *San Antonio v. Tobin* (Tex. Civ. App.), *Id*.

The city council has no power to refuse to accept the services of a person regularly appointed by the police and fire commission, or to prevent the performance of such services. *San Antonio v. To-*

## § 460. Restrictions—merit system.

Some laws impose restrictions and require appointments in the municipal service to be made according to fitness and merit, to be ascertained, so far as practicable, by competitive examination.<sup>8</sup>

bin (Tex. Civ. App.), 101 S. W. 269.

The appointment of a janitor of a city police station creates a contract between the city and its employee. *Dolan v. Orange*, 70 N. J. L. 106, 56 Atl. 130.

Under a statute providing that the police commissioners shall appoint a janitor for the care of the police station, such janitor may be appointed although another person was at the same time performing the same duties under a contract of employment with the municipal authorities. *Wiggins v. Manchester*, 72 N. H. 576, 58 Atl. 522.

Station house keepers are not part of the police force under laws organizing the police force of the City of Albany. *People v. Ham*, 166 N. Y. 477, 60 N. E. 191, order 68 N. Y. S. 298, reversed.

The office of superintendent of police is identical with that of chief of police under Ohio laws applicable to certain cities. *State v. Stroble*, 25 Ohio Cir. Ct. R. 762.

A statute providing that officers and employees of the police department of any city in the state at the time the law goes into effect, shall not be removed, except as therein provided, is not an exercise of the appointing power by the legislature as prohibited by the constitution. *State v. Hall*, 25 Ohio Cir. Ct. R. 361.

A municipal charter authorizing the city council to provide by ordinance for the election or appointment of such other officers as it might deem necessary does not empower the city council to provide by resolution for the appointment of police officers for the city. *Chicago v. Bullis*, 235 Ill. 473, 477, 85 N. E. 614, reversing *Chicago v. Bullis*, 138 Ill. App. 297.

8. *Illinois*. *Ptacek v. People*, 194 Ill. 125, 62 N. E. 530, affirming 94 Ill. App. 571; *People v. Lindblom*, 215 Ill. 58, 74 N. E. 73; *People v. Chicago*, 131 Ill. App. 266.

*Massachusetts*. *Attorney General v. Tillinghast*, 203 Mass. 539, 541, 89 N. E. 1058.

*New York*. *In re Lazenby*, 101 N. Y. S. 5, 116 App. Div. 135; *People v. Homer*, 188 N. Y. 588, 81 N. E. 1172; *People v. Snyder*, 94 N. Y. S. 541, 106 App. Div. 28; *People v. Wilson*, 94 N. Y. S. 544, 106 App. Div. 609; *Schnyder v. New York*, 88 N. Y. S. 646, 95 App. Div. 305; *People v. Ingham*, 94 N. Y. S. 733, 107 App. Div. 41; *People v. Mosher*, 61 N. Y. S. 452, 57 N. E. 88; *Shaughnessy v. Fornes*, 172 N. Y. 323, 65 N. E. 168; *People v. Swanstrom*, 79 N. Y. S. 934, 79 App. Div. 94; *People v. Stratton*, 80 N. Y. S. 279, 79 App. Div. 149; *People v. Scannell*, 71 N. Y. S. 383, 63 App. Div. 243; *People v. Wheeler*, 106 N. Y. S. 450, 56 Misc. Rep. 289; *Burke v. Holtzmann*, 97 N. Y.

Under a statute requiring police officers to be appointed from the classified list of such department, no appointment can be made unless the service in such department has been classified.<sup>9</sup>

**§ 461. Preference in appointments and promotions—veteran acts.**

Laws often make provision for preference in appointment and promotions, e. g., honorably discharged soldiers, sailors, marines and veterans in public service.<sup>10</sup>

Under such laws giving preference to veterans, a village board, may select between two applicants, one of whom is a veteran soldier and the other, a veteran fireman.<sup>11</sup> So under such laws a veteran is entitled to preference to retention in a position unless he is incompetent or derelict in his duties.<sup>12</sup>

A constitutional provision supplemented by the city charter conferring the power of making appointments involving the exercise of discretion, upon city authorities, does not deprive a veteran of his right to preference in appointment.<sup>13</sup>

S. 218, 110 App. Div. 564; Rowley v. Rochester, 69 N. Y. S. 160, 34 Misc. Rep. 291; Deering v. New York, 107 N. Y. S. 934; People v. McGuire, 124 N. Y. S. 552, 139 App. Div. 680, 683.

*Texas.* Callaghan v. McGoun (Tex. Civ. App.), 90 S. W. 319.

9. State v. Stroble, 25 Ohio Cir. Ct. R. 762.

10. Boyer v. Creston (Iowa, 1907), 113 N. W. 474; People v. Saratoga Springs, 159 N. Y. 568, 54 N. E. 1093; People v. Stratton, 174 N. Y. 531, 66 N. E. 1114; People v. Stratton, 80 N. Y. S. 269, 79 App. Div. 149; King v. Otumwa (Iowa, 1910), 126 N. W. 943; Williams v. Darling, 122 N. Y. S. 534, 536, 67 Misc. Rep. 205;

Dever v. Platt, 81 Kan. 200, 105 Pac. 445.

11. People v. Village of Dobbs Ferry, 71 N. Y. S. 578, 63 App. Div. 276.

12. Stutzbach v. Coler, 70 N. Y. S. 901, 62 App. Div. 219, affirmed, 61 N. E. 697.

13. People v. Burch, 80 N. Y. S. 274, 79 App. Div. 156.

**Preference.** Where several schools are rearranged by the board of education, a principal of one of the schools is entitled to preference in appointment as principal of one of the rearranged schools, under charter providing that, "in case of the consolidation or discontinuance of schools, principals and teachers thereby de-

The preference of appointment given to veterans by the so-called "Veteran Acts" is based on the theory of equality of qualifications, and a veteran, though he may be able to perform the duties of the office, will not be preferred to other applicants who have superior qualifications and are better fitted for the place.<sup>14</sup> Whether the qualifications of a veteran are equal to the qualifications of his competitors is to be decided by the appointing power.<sup>15</sup>

A veteran has no absolute right to preference of appointment merely because he is a veteran; to be entitled thereto, he must claim the preference on that ground.<sup>16</sup>

In New York the Veteran Acts are held to apply only to veterans holding subordinate offices and not to the heads of departments.<sup>17</sup>

Laws providing that honorably discharged soldiers and sailors who have served in the army or navy of the United States shall be preferred for appointment to or retention in public offices and public works have been

prived of employment, shall be preferred in appointments to be made in any of the schools of the city." *Cusack v. Board of Education, etc.*, 79 N. Y. S. 803, 78 App. Div. 470.

14. *Iowa*. *Boyer v. Creston* (Iowa, 1907), 113 N. W. 474; *Iowa v. Garbroski*, 111 Iowa 496, 82 N. W. 956, 56 L. R. A. 570, 82 Am. St. Rep. 524.

*Kansas*. *Dever v. Humphrey*, 68 Kan. 759, 75 Pac. 1037; *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034.

*Massachusetts*. In re Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

*New York*. *Matter of Sweeley*, 12 Misc. Rep. (N. Y.) 174; *People v. Poillon*, 16 Abb. N. Cas. (N. Y.) 119; *People v. Knapp*, 4 N. Y. S. 825; *People v. Saratoga Springs*, 54 Hun (N. Y.) 16, 7 N. Y. S. 125; *Allaire v. Knox*, 33 Misc. Rep. (N. Y.) 555; *Sullivan v. Gilroy*, 8 N. Y. S. 401.

*United States*. *Keim v. United States*, 177 U. S. 290.

15. *Boyer v. Creston* (Iowa, 1907), 113 N. W. 474; *People v. Saratoga Springs*, 54 Hun (N. Y.) 16, 7 N. Y. S. 125.

16. *People ex rel. v. Snyder*, 94 N. Y. S. 541, 106 App. Div. 28; *People ex rel. v. Wilson*, 94 N. Y. S. 544, 106 App. Div. 28.

17. *People v. Saratoga Springs*, 54 N. Y. S. 1083, 35 App. Div. 141; *People v. Yonkers*, 14 N. Y. S. 455.



held constitutional.<sup>18</sup> But laws giving preference of appointment only to veterans of the civil war have been held in New York to create a favored class and are therefore unconstitutional.<sup>19</sup>

### § 462. Time of exercise of power of appointment.

Where the power of appointment exists the rule usually laid down is that it may be exercised at any time during the term of the officer or the board or body, authorized to act in the premises, in a proper case. Thus it has been held that a mayor whose term expires at a certain hour of a certain day has the power at any time prior to the expiration of his term to fill any position which his successor in office might fill if left vacant.<sup>20</sup> So a municipal council may elect an officer before the present incumbent's term has expired unless the law forbids.<sup>21</sup> And where the council has power to appoint and is a yearly body, an ordinance may provide for the appointment of an officer for a term of two years.<sup>22</sup> But a

18. *Kansas*. *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034; *Dever v. Humphrey*, 68 Kan. 759, 75 Pac. 1037.

*Massachusetts*. In re Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58.

*Minnesota*. *State v. Miller*, 66 Minn. 90.

*New York*. *Matter of Stutzbach v. Coler*, 168 N. Y. 416, affirming 62 App. Div. 219; *People v. Stratton*, 80 N. Y. S. 269, 79 App. Div. 149; *Matter of Sullivan*, 55 Hun (N. Y.) 285, 8 N. Y. S. 401.

"In *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574, 44 L. Ed. 774, the preference law enacted by congress was considered and interpreted, but its constitutionality seems to have been conceded as no attack was made on its validity." *Goodrich v. Mitchell*, 68 Kan. 765, 774, 75 Pac. 1034.

19. *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

Laws exempting veterans from competitive examination only where the compensation does not exceed \$4.00 per day are unconstitutional. *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

20. *Bakely v. Nowrey*, 68 N. J. L. 95, 52 Atl. 289.

21. *State v. Catlin*, 84 Tex. 48, 19 S. W. 302.

22. *Anderson v. Camden*, 58 N. J. L. 515, 33 Atl. 846.

Where the council is authorized to make the appointment one holding the office without being inducted therein by the council is a usurper though he is not holding over the objection or without the consent of the mayor. *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259.

council not being constituted as it will be when the term of office will expire has no authority to appoint a successor of the incumbent before the expiration of the current term.<sup>23</sup>

Where one is holding an office for a definite term although subject to removal at the pleasure of the council a new appointment to the same office cannot be made without removing the incumbent.<sup>24</sup>

Under a charter, providing that the mayor shall appoint persons to fill all vacancies which may "occur" during the recess of the board of aldermen, it was held that the word "occur" refers to casualties not provided for by law, and not to a rejection by the board of the nomination made by the mayor.<sup>25</sup>

It has been held in New Jersey that the official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise.<sup>26</sup> However, a prospective appointment made by the legal authority, to fill a vacancy when it arises is, in the absence of express law forbidding, a legal appointment, and vests title to the office in the appointee.<sup>27</sup>

In one case an ordinance directed the council to appoint a street commissioner at the first meeting of each year who should hold office for one year and until his successor was appointed. A statute provided that every officer appointed for a fixed term should hold over until his successor should be appointed, unless otherwise provided by statute. At the first meeting the council after voting several times without result, adjourned *sine die*,

23. *State v. Lane*, 53 N. J. L. 275, 21 Atl. 302.

24. *State v. Curry*, 134 Ind. 133, 33 N. E. 685.

25. *Miller v. Washington*, 2 Hayward & H. (D. C.) 241, Fed. Cas. No. 9593a.

26. *Dickinson v. Jersey City*, 68 N. J. L. 99 (1902), 53 Atl. 278; *Kirkham v. Russell*, 76 Va. 956.

To be by new board, outgoing cannot. *Ott v. State*, 78 Miss. 487, 29 So. 520.

27. *Whitney v. Van Buskirk*, 40 N. J. L. 463.

without appointing relator's successor as street commissioner, and afterwards approved relator's bond as a hold-over officer, although such approval was afterwards reconsidered and lost. The court held that relator was continued in office and the council could not at a subsequent meeting appoint a successor.<sup>28</sup>

### § 463. Manner of appointment of officer.

The method of appointment of officers and employees must conform to the requirements of the law.<sup>29</sup> At common law an oral appointment to office was invalid, and under a statute this manner of appointment is also held invalid in New York. The appointment should be in writing.<sup>30</sup>

Where the appointment is made by a board or body, as the council, some laws require the appointment to be by ballot, and a record made of the transaction.<sup>31</sup> Under some laws the council may elect by motion and a yea and nay vote.<sup>32</sup>

One who is acting as a councilman *de facto*, and not *de jure*, cannot by his own vote, upon his own appoint-

28. *State ex rel. v. Alexander*, 107 Iowa 177, 77 N. W. 841.

29. *People v. Kellar*, 61 N. Y. S. 746, 30 Misc. (N. Y.) 52; *Commonwealth v. Crogan*, 155 Pa. St. 448; *Launtz v. People*, 113 Ill. 137.

30. *People v. Murray*, 70 N. Y. 521, reversing 81 Hun (N. Y.) 579; *People v. Kellar*, 61 N. Y. S. 746, 30 Misc. 52.

Compare *People v. Fitzsimmons*, 68 N. Y. 514.

See Throop on Pub. Officers, § 87, *et seq.*

Resolution of board. *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456.

Officer should be appointed under seal in England. Arnold's

Mun. Corp. (5th Ed., London), p. 39 n. a.

31. *Tracey v. People*, 6 Colo. 151, 153, 4 Am. & Eng. Corp. Cases 373.

See ch. 13 *post*.

What constitutes a majority of all the members of the council. *People v. Herring*, 30 Colo. 445, 71 Pac. 413.

32. *Attorney-General v. Remick*, 71 N. H. 480, 53 Atl. 308.

Record. The fact that the record of appointment of an officer was interlined is not material so long as it was read and approved by the board, as being in accordance with the facts. *Brophy v. Hyatt*, 10 Colo. 223, 227, 15 Pac. 399.

ment, confer upon himself a *de jure* title to the appointive office.<sup>33</sup>

If the charter prescribes the method of selection, which is usual,<sup>34</sup> of course, it cannot be changed by ordinance, or otherwise.<sup>35</sup> If no method is laid down, any method may be adopted which is appropriate to obtain fairly the will of the body, in accordance with parliamentary practice.<sup>36</sup>

#### § 464. Commission.

A commission *as evidence* of the appointment is usually issued to the appointee signed by the appointing officer. This formal writing evidences the fact of the final intention of the acting officer to make the appointment in performance of a duty enjoined by law. No particular form is required; any paper signed by the appointing authority showing an intention to make the appointment will answer; and the appointment is good, although the commission is never delivered.<sup>37</sup>

#### § 465. When appointment is complete it cannot be revoked.

Appointments to office by whomsoever made, are intrinsically executive acts.<sup>38</sup> If the appointing officer or body has no power of removal when the power to appoint has been once exercised it is irrevocable without the consent of the appointee and the appointee will hold

33. *Armstrong v. Whitehead*, 67 N. J. L. 405, 51 Atl. 472.

Appointment of, by *de facto* mayor, valid. *State ex rel. v. Badger*, 90 Mo. App. 183.

34. *Goodloe v. Fox*, 96 Ky. 627, 16 Ky. L. Rep. 653, 29 S. W. 433.

35. *Bates v. Nome*, 1 Alaska 208; *State v. Michellon*, 42 N. J. L. 405; *State v. Newark*, 47 N. J. L. 117.

36. *Murdock v. Strange*, 99 Md. 89, 57 Atl. 628; *Rich v. McLaurin*, 83 Miss. 95, 35 So. 337.

37. *People v. Murray*, 70 N. Y. 521; *People v. Fitzsimmons*, 68 N. Y. 514.

38. Made by a court. *Taylor v. Com.*, 3 J. J. Marsh (Ky.) 401.

By city council. *Ackley's Case*, 4 Abb. Prac. (N. Y.) 35.

By executive officer. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

office during the term.<sup>39</sup> That is, the appointment of an officer once made cannot be revoked by the appointing power unless permissible under the power of removal. This is true of appointments made by a single executive, an executive board, a court, or a legislative body or board.<sup>40</sup> An appointment is complete when the last act required of the appointing power has been performed.<sup>41</sup> Thus signing the commission when the law requires it, by the president of the United States in appointments made by him is the last act.<sup>42</sup> So when the appointment is to be made by a mayor the making and filing of the appointment completes the act and places it beyond the mayor's recall.<sup>43</sup> So a writing signed by the mayor making a nomination to be confirmed by the council under the erroneous belief that such confirmation was necessary, though not required by law, completes the appointment.<sup>44</sup>

In case of the appointment of a judicial officer by a judge a declaration in open court is final in the absence of a requirement that the appointment should be in writing.<sup>45</sup>

When the appointment is to be made by the council it is complete when the resolution providing for the appointment is finally passed.<sup>46</sup>

If a council has no authority to recall or annul an appointment made by it, a resolution adopted by such body

39. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Ackley's Case*, 4 Abb. Prac. Rep. (N. Y.) 35; *Cole v. Langly*, 133 Mass. 204; *Whitney v. Von Buskirk*, 40 N. J. L. 463.

40. *State v. Starr*, 78 Conn. 636, 63 Atl. 512.

41. *State ex rel. Coogan v. Barbour*, 53 Conn. 76, 85; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Conger v. Gilmer*, 32 Cal. 75, 12 L. Ed. 60.

42. *Marbury v. Madison*, 1 Cranch. (U. S.) 137, 12 L. Ed. 60.

When the sealed commission is delivered, if the law so requires, the appointment is complete. *Conger v. Gilmer*, 32 Cal. 75.

43. *Speed v. Detroit*, 97 Mich. 198, 56 N. W. 570; *Atty.-Gen. v. Corliss*, 98 Mich. 372, 57 N. W. 410.

44. *People v. Fitzsimmons*, 68 N. Y. 514.

45. *Hoker v. Field*, 10 Bush. (Ky.) 144.

46. *Ackley's Case*, 4 Abb. Pr. (N. Y.) 35; *People v. Stowell*, 9 Abb. N. C. 456.

rescinding its action in confirming a nomination by the mayor, and rejecting and disapproving such nominations, and refusing to approve the appointee's official bond, does not deprive the appointee of the right to the office.<sup>47</sup> If the appointment is made by a legislative body by ballot the usual judicial view is that the appointment is complete only when the result of the ballot is learned and declared,<sup>48</sup> for the rule is enforced that an election may be set aside for illegality, fraud, mistake or irregularity before the result is announced.<sup>49</sup>

### § 466. Confirmation of appointment.

Laws and municipal charters frequently require the appointment to be approved or confirmed by some officer or body, or board, as the council or legislative body of the municipal corporation. This provision is usually held mandatory, hence, without approval or confirmation as prescribed, the officer is not authorized to enter upon the duties of the office.<sup>50</sup> The fact that he takes the oath of office, gives bond and performs the duties of the office will not make him an officer although it is announced that he has been confirmed without objection of any member of the council.<sup>51</sup>

47. *In re Fitzgerald*, 82 N. Y. S. 811, 88 N. Y. S. 1125, 88 N. Y. App. Div. 434; *People v. Stowell*, 9 Abb. N. Cas. 456.

48. *State v. Starr*, 78 Conn. 636, 63 Atl. 512.

49. *Baker v. Cushman*, 127 Mass. 105.

See further on completion of appointment. *State v. Phillips*, 79 Me. 506, 11 Atl. 274; *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387; *State v. Wadhams*, 64 Minn. 318, 67 N. W. 64; *State v. Miller*, 62 Ohio St. 436, 78 Am. St. Rep. 732, 57 N. E. 227.

50. *Illinois. People v. Weber*, 89 Ill. 347.

*Iowa. State ex rel. v. Alexander*, 107 Iowa 177, 77 N. W. 481.

*New Jersey. Hawkins v. Cook*, 62 N. J. L. 84, 40 Atl. 781.

*New York. King v. Buffalo*, 10 N. Y. S. 564.

*Utah. State v. Sheets*, 26 Utah 105, 72 Pac. 334.

51. *Commonwealth v. Allen*, 128 Mass. 308.

**Confirmation of appointment.** An appointment by the mayor, ineffectual because of the refusal of the council to approve same, can not be made effective by a subsequent council after the appointee's time has expired. *Beresford v.*

A statute providing that the mayor may, with the approval of the board of aldermen appoint members of the police and fire commission, and may fill all vacancies thereon does not require that a member of such commission appointed by the mayor to fill a vacancy should be confirmed by the board of aldermen.<sup>52</sup>

The confirmation by the council of an appointment by the mayor, when the office has been previously fixed, creates a contingent liability against the city and it requires the consent of a majority of the council to confirm the appointment under the statute.<sup>53</sup>

It is the duty of the council to act upon the nominations of the mayor to fill alleged vacancies in office, although they may have fair ground for the contention that no vacancies exist, and the offices are in possession of persons claiming unexpired title thereto, so that upon confirmation, *quo warranto*. will be possible.<sup>54</sup>

The consent of the council to an appointment made by the mayor need not be expressed in any particular form. Thus it was held in a Minnesota case that recognition of an appointment of a police sergeant by an ap-

Donaldson, 103 N. Y. S. 600, 54 Misc. Rep. 138.

An ordinance requiring the approval of the board of health to the appointment of a city chemist by the mayor and council is not in violation of the charter placing the appointing power in the mayor and city council. St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918.

"The council, upon nomination by the mayor shall fill the vacancy by the selection of some person by a vote of a majority of the aldermen elected and qualified." Held, mayor could not fill vacancy by his individual appointment, though the council was not in session. "The nomination of the

mayor is only the initial step in making the appointment, and the appointment becomes complete only when concurred in by a majority of the aldermen." Brumby v. Boyd, 28 Tex. Civ. App. 144, 66 S. W. 874.

52. Watkins v. Mooney, 24 Ky. L. Rep. 1469, 71 S. W. 622.

By governor, of municipal officer. Constitution as to confirmation of governor's appointees does not apply. Com. v. Moir, 199 Pa. St. 534, 52 L. R. A. 837, 49 Atl. 351; 46 Pittsburg Leg. J. 385; State v. Churchman, 3 Del. 167, 51 Atl. 49.

53. State v. Sheets, 26 Utah 105, 72 Pac. 334.

54. Hoell v. Camden, 68 N. J. L. 226, 52 Atl. 213.

proval of the pay rolls every month for several years sufficiently establishes the consent of the council to an appointment made by the mayor.<sup>55</sup>

### § 467. Ratification of irregular or void appointment.

The general rule is that an illegal appointment to a municipal office cannot be ratified by subsequent declarations of public officers so as to make it valid.<sup>56</sup> So, ordinarily, an illegal appointment to office by the governor cannot be ratified by the city comptroller in accepting the bond of the appointee.<sup>57</sup>

### § 468. Mandamus as to appointment.

Where the duty to make an appointment is clear and unambiguous, *mandamus* will lie to control the performance of such duty.<sup>58</sup> So the duty of a governor, enjoined by statute, to issue a commission to a police judge who has been duly elected or appointed, is purely ministerial and *mandamus* will lie to compel him to perform it.<sup>59</sup>

55. *Larson v. St. Paul*, 83 Minn. 473, 86 N. W. 459.

56. *People v. Partridge*, 78 N. Y. S. 249, 38 Misc. Rep. 697.

57. *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, 8 Det. Leg. N. 50.

See § 504 *post*.

58. *Kelly v. Van Wyck*, 71 N. Y. S. 814, 35 Misc. Rep. 210.

Duty to make appointments. Laws containing boards for the examination of plumbers in cities and requiring the mayor to ap-

point the members thereof are mandatory, and the mayor must appoint such board if it is possible for him to do so. *People v. Moore*, 79 N. Y. S. 7, 78 App. Div. 28.

*Mandamus* will not lie to compel the mayor and aldermen of a city to create a board of plumbers unless it is their clear and unambiguous duty to do so. *Caven v. Coleman*, 100 Tex. 467, 101 S. W. 199, reversing 96 S. W. 774.

59. *Traynor v. Beckham*, 25 Ky. L. Rep. 283, 74 S. W. 1105.



§ 469. Title to office is determined by *quo warranto* not by *mandamus*.<sup>60</sup>

It is a well-established rule that *mandamus* is not the proper remedy to try the right to an office, the title to which is in dispute, either in a direct or in a collateral proceeding.<sup>61</sup> Thus, where an office is actually filled by an incumbent, exercising the functions of the office *de facto*, and under color of right, *mandamus* will not lie to compel the admission of another claimant, or to determine the disputed question of title. The claimant, in such case, must have recourse to the remedy of *quo warranto*.<sup>62</sup> So after an officer has received his commission, has been inducted into office, and is in by color of title, he cannot be ousted by the action of the governor, as by appointment of another in his place. The party claiming the office in such case must resort to *quo warranto*.<sup>63</sup> So, the election of a person to an office,

60. *Duane v. McDonald*, 41 Conn. 517; *Bonner v. State*, 7 Ga. 473; *People v. Kilduff*, 15 Ill. 492; *State v. DeGress*, 53 Tex. 387; *State v. Stone*, 16 R. I. 620; *Daniels v. Newbold*, 125 Iowa 193, 100 N. W. 1119.

61. *State ex rel. Tracy v. Taaffe*, 25 Mo. App. 567; *State ex rel. Cannon v. May*, 106 Mo. 488; *State ex rel. v. Draper*, 48 Mo. 213; *Winston v. Moseley*, 35 Mo. 146; *State ex rel. Jackson v. Moseley*, 34 Mo. 375; *Churchwardens*, 1 App. Cas. 611, 35 L. T. 381; *Mott v. Connolly*, 50 Barb. (N. Y.) 516.

62. *Denver v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, and note; *State ex rel. Horstman v. Gasconade Co. Ct.*, 25 Mo. App. 446; *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *State v. Choate*, 11 Ohio 511; *Com. v. Meeser*, 44 Pa. St. 341; *State v.*

*Oates*, 86 Wis. 634, 39 Am. St. Rep. 912; *Leeds v. Atlantic City*, 52 N. J. L. 333; *Frey v. Michie*, 68 Mich. 323.

63. *State ex rel. v. Draper*, 48 Mo. 210; *Ellison v. Raleigh*, 89 N. C. 125; *Brown v. Turner*, 70 N. C. 93; *State ex rel. v. Gastinel*, 18 La. Ann. 517; *State v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027; *Updegraff v. Crans*, 47 Pa. St. 103.

**Injunction denied.** *Johnson v. Garside*, 65 Hun (N. Y.) 208, 20 N. Y. S. 327; *State ex rel. v. Withrow*, 154 Mo. 397, 55 S. W. 460; *Cochran v. McCleary*, 22 Iowa 75; *Morris v. Whelan*, 11 Abb. N. C. (N. Y.) 64; *Huels v. Hahn*, 75 Wis. 468, 44 N. W. 507.

**Injunction allowed to prevent use of a false certificate of election.** *Reid v. Moulton*, 51 Ala. 255; *Miller v. Lowry*, 5 Phil. (Pa.) 202.

The acceptance of an appointment to office will estop the incum-

who does not possess the requisite qualifications, gives him no right to hold the office, and a writ of *mandamus* will not lie to give him a certificate of election therefor.<sup>64</sup>

Where, however, the title to an office is uncontested or has been settled by adjudication, *mandamus* will lie to compel the delivery of books and papers belonging to the office.<sup>65</sup>

So, the right to an office cannot be determined in a proceeding by *mandamus* to compel the payment of salary to a person claiming such office, or in a proceeding to compel the performance of official duty alleged to be obligatory, by reason of the official character of the claimant. In such cases he who has the better *prima facie* right must be recognized until, by contesting the election, or by proceedings in *quo warranto*, the rights of the parties are finally determined.<sup>66</sup>

Equity has no jurisdiction to adjudicate the right to an office.<sup>67</sup> It is the settled law in Missouri that in an action for fees the title to the office cannot be decided, and that a *de facto* officer, while in possession of the office, can recover the fees of the office. But the rule is founded upon the *prima facie* title of the officer *de facto*,

bent from showing that in the creation of the office the prescribed legal method was not observed. *Buck v. Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243.

*Certiorari* is not the appropriate remedy for contesting the legality of a mere appointment to a public office. *Simon v. Hoboken*, 52 N. J. L. 267, 19 Atl. 259; *Haines v. Camden*, 47 N. J. L. 454, 1 Atl. 515.

It cannot be determined in private action. *Mott v. Connolly*, 50 Barb. (N. Y.) 516.

The legislature may confer upon a city council the power to determine primarily one's eligibility to the office of mayor and such decision is not subject to review by

*quo warranto*. *Seay v. Hunt*, 55 Tex. 545.

Testing right of office, statutory rule. *State ex rel. v. Alexander*, 107 Iowa 177, 77 N. W. 841; *Wallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408.

64. *State ex rel. v. Newman*, 91 Mo. 445, 3 S. W. 849; *State ex rel. v. Williams*, 99 Mo. 291, 12 S. W. 905.

65. *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660, 47 L. R. A. 393. See also *State ex rel. v. Trent*, 58 Mo. 571.

66. *State ex rel. Simmons v. John*, 81 Mo. 13.

67. *State ex rel. v. Aloe*, 152 Mo. 466, 54 S. W. 494.

and in cases where such *prima facie* title does not exist, the rule cannot apply.<sup>68</sup>

§ 470. Proceedings by quo warranto to determine title to office.

*Quo warranto* is the proper remedy to oust an officer from the office where he has unlawfully entered upon the duties of the office before receiving a commission, where a commission is required.<sup>69</sup> So, *quo warranto* will lie on behalf of the state to determine the right of individuals to exercise the office of school directors.<sup>70</sup>

The primary and fundamental question, in a proceeding in *quo warranto*, is whether the defendant is legally entitled to hold the office, and not as to the rights of any other person who may claim it. Where the information is on the relation of one who himself claims to have been elected, his rights may incidentally have to be determined, but not where the proceeding is instituted by the state.<sup>71</sup>

68. *Dickerson v. Butler*, 27 Mo. App. 9; *State ex rel. v. John*, 81 Mo. 13; *State ex rel. v. Draper*, 48 Mo. 213; *State ex rel. v. Clark*, 52 Mo. 508; *Hunter v. Chandler*, 45 Mo. 452, 457.

Under the corrupt practices act of 1893 of Missouri, the attorney-general has no power or right *ex officio* of his own motion to institute a proceeding to oust one who has been elected to an office by a plurality of the votes of the district. Nor is such a proceeding instituted by him on the application of the defeated candidate, who is required by the act to specify the charge, make affidavit thereto, and give bond, a *quo warranto* proceeding instituted by the attorney-general *ex officio*, but it is purely a special proceeding insti-

tuted under the Act. of 1893, and therefore falls within all the limitations and restrictions by the statute provided. *State ex inf. v. Bland*, 144 Mo. 534, 46 S. W. 440.

The forfeiture of the office of mayor in a *quo warranto* proceeding, for misconduct deprives him of the right to take or hold the office during the remainder of the term. *State v. Rose*, 74 Kan. 260, 86 Pac. 296.

69. *State ex rel. Atty. Gen. v. Morrison*, 41 Mo. 238; *State ex rel. Atty. Gen. v. Pool*, 41 Mo. 32. See *State ex inf. v. Page*, 140 Mo. 501, 41 S. W. 963.

70. *State ex rel. Boyd v. Rose*, 84 Mo. 1198.

71. *State ex rel. v. Townsley*, 56 Mo. 107.

In a *quo warranto* proceeding on information of the attorney-general against one who is exercising the duties of the office of chief of police, being *ex officio*, an information on behalf of the state, it is not necessary to specify the grounds on which the proceeding is based; all that is required to put him to his answer is a charge in general language that the respondent has usurped and unlawfully exercises the functions of the office.<sup>72</sup> But where the proceedings are begun by a private individual, his interest in question must appear.<sup>73</sup>

In Missouri, the supreme court acquires its jurisdiction, in a *quo warranto* proceeding to remove an officer, from the constitution, and any act of the legislature that undertakes to confer, for example, on a board of police commissioners exclusive jurisdiction of such matters is invalid and that far void.<sup>74</sup>

In a *quo warranto* proceeding in Missouri the court will not enter into an inquiry as to the legality of votes or the qualifications of voters. The statute provides another tribunal and different mode of determining these matters, and this provision is exclusive.<sup>75</sup>

**§ 471. Power of municipal legislative body to judge of the election and qualification of its own members and other municipal officers.**

Municipal charters and laws applicable usually confer power upon the council or governing legislative body to judge of the election and qualifications of its own members,<sup>76</sup> and such laws are generally held valid.<sup>77</sup>

72. State ex inf. v. Vallins, 140 Mo. 523, 41 S. W. 887.

73. State on inf. v. Berkeley, 140 Mo. 184, 41 S. W. 732.

74. State ex inf. v. Vallins, 140 Mo. 523, 555, 41 S. W. 887; State ex inf. v. Equitable Loan & Inv. Co., 142 Mo. 325, 336, 337, 41 S. W. 916.

75. State ex rel. v. Mason, 77 Mo. 189.

76. Massey v. People, 201 Ill. 409, 66 N. E. 392, reversing 103 Ill. App. 397; Mitchell v. Witt, 98 Va. 459; Jobson v. Bridges, 84 Va. 298, 5 S. E. 529; Stine v. Berry, 96 Ky. 63, 27 S. W. 809.

The house of delegates of the City of St. Louis has authority

And laws sometimes give to the municipal legislative body jurisdiction to determine the election and qualification of other municipal officers.<sup>78</sup> But power granted to a municipal body to "be the judge of the election and qualifications of its own members" does not grant power to hear and determine a contest of an election for a municipal officer, as marshal; nor does such grant include the power to enact ordinances for such purpose.<sup>79</sup>

The adjudications present some conflict as to whether such provisions render the council the final and exclusive judge in determining these matters. Courts have made the question to depend upon the charter language and the proper construction to be given to it, and also on the constitution and the general laws of the state respecting contested elections, and the proceedings relating to the remedy by *quo warranto*.<sup>80</sup> Thus a charter provision

under the charter to oust an elected member for his former conviction of crime, but it has no power to admit to its membership the candidate who received the next highest number of votes. *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082.

77. *State v. Fitzgerald*, 44 Pa. St. 332; *Brush v. Lemma*, 77 Ill. 456; *People v. Fitzgerald*, 41 Mich. 2; *State v. Camden*, 47 N. J. L. 64, 54 Am. Rep. 117; *Seay v. Hunt*, 55 Tex. 545; *Mack v. Holloway*, 2 Ala. 31; *New Orleans v. Morgan*, 7 Mart. (N. S.), (La.) 1, 18 Am. Dec. 232.

78. *Keating v. Stack*, 116 Ill. 191, 5 N. E. 541; *People v. Londener*, 13 Colo. 303, 6 L. R. A. 444, 22 Pac. 764.

Board of fire department, power to determine election of engineers in case of contested election, act judicially. *People v. Delegates of San Francisco Fire Department*, 14 Cal. 479.

Courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. *Landes v. Walls*, 160 Ind. 217, 66 N. E. 679.

79. *Vosberg v. McCrary*, 77 Tex. 568, 14 S. W. 195.

80. *Kendall v. Camden*, 47 N. J. L. 64, 54 Am. Rep. 117, approving 1 *Dillon, Mun. Corp.* (4th Ed.), § 202; *McVeary v. New York*, 80 N. Y. 185, 36 Am. Rep. 600, reversing 1 *Hun* 35, 3 *Thomp.*, and *C.* 131; *People v. Hall*, 80 N. Y. 117.

Where the council is made the exclusive judge of the returns and qualification of its own members, court will not interfere except at the suit of the people in *quo warranto* proceedings to determine the *de jure* rights of a member to act. *Evanston v. Carroll*, 92 Ill. App. 495.

Where the council has power to judge of the election of officers its

that the council "shall judge of the qualifications, election and return of the members thereof" does not make the council the final judge, and, hence, the courts may determine the right of a councilman to office on an information in the nature of *quo warranto*.<sup>81</sup> The jurisdiction of the court remains unless it clearly appears that the intention was to take it away.<sup>82</sup>

And where the charter merely confers the power, and the method of procedure is neither prescribed by charter nor ordinance the contestant may invoke the jurisdiction of the courts.<sup>83</sup> However, it is competent for a city council, acting under a charter making this body the judge of the election and returns and the qualifications of its own members and other city officers, to provide, by ordinance, the rules for contesting the election.<sup>84</sup>

Many cases hold that where the charter provides that the municipal tribunal shall be the *sole* or *final* judge

decision gives to the person in whose favor it is rendered a *prima facie* right to the office until he is duly ousted by legal proceedings. *Echols v. State*, 56 Ala. 131.

Power conferred upon a council is not repealed by a subsequent act to regulate the election which confers upon court the power to hear and determine contested elections for city officers, when. *Henry v. Camden*, 42 N. J. L. 335.

81. *State ex rel. v. Fitzgerald*, 44 Mo. 425.

To take away the power of the court, language should be used showing such purpose. "To give a statute such effect the legislature must say in so many words that they intend to take the power away." *Cowan, J. in ex parte Heath*, 3 Hill. (N. Y.) 51.

82. *Gass v. State*, 34 Ind. 424;

*MacIot v. Davenport*, 17 Iowa 379; *Kane v. People*, 4 Neb. 509; *State v. Marlow*, 15 Ohio St. 114; *People v. Witherell*, 14 Mich. 48; *Sellick v. Council*, 40 Conn. 359.

83. *State ex rel. v. Funck*, 17 Iowa 365.

84. "As every corporation has the incidental or implied power to pass all ordinances, needful or requisite to carry into effect, and make operative, power which is conferred upon it by its charter, it is clear that the city, under the provisions of the charter above granted had authority to pass this by-law or ordinance, regulating the mode and prescribing the manner in which they should exercise their powers as judges of the election returns and qualifications of their own members." *Ex parte Strahl*, 15 Iowa 369, 375, per Dillon, J.

of the election and qualifications of its own members action in this respect is conclusive and cannot be tried in any other tribunal.<sup>85</sup> Such provision constitutes the

85. *California*. *People v. Metzker*, 47 Cal. 524.

*Illinois*. *Foley v. Tyler*, 161 Ill. 167, 43 N. E. 845; *Keating v. Stack*, 116 Ill. 191, 5 N. E. 547.

*Michigan*. *People ex rel. v. Harshaw*, 60 Mich. 200; *Doran v. De Long*, 48 Mich. 552; *Cooley v. Ashley*, 43 Mich. 458; *People v. Port Huron*, 41 Mich. 2.

*New Hampshire*. *Cate v. Martin*, 69 N. H. 610, 45 Atl. 644.

*Oregon*. *Simon v. Portland*, 9 Oregon 437.

**Council decision conclusive.** "When the legislature enacts that each branch of a city government shall be the judge of the elections of its members, the inference is that they copied the language from the Constitution understanding that it would mean in the statute what it means in the Constitution and intending that municipal legislative bodies created, organized, and working on the model of the state legislature shall have the same powers, as judges of the elections of their members. It is also probable that, for reasons of public convenience in the transaction of the affairs of cities, the legislative intention was to establish a special tribunal for the determination of such cases which would act expeditiously and without the delays ordinarily incident to judicial procedure." *Atty. Gen. ex rel. v. Sands*, 68 N. H. 54, 44 Atl. 83.

Under the New York City charter making the board of aldermen

the judge of its election returns of its own members, subject to review by *certiorari*, it may determine from the returns who are elected but cannot go back of the returns. *People v. Fornes*, 80 N. Y. S. 385, 79 App. Div. 618, affirmed, 67 N. E. 216.

Where the city council is constituted not only a board of the election returns for its members and other city officers, but also a tribunal empowered to try and decide all questions of law and fact involved in the election contested, its decision upon a contest is final and the question cannot be retried on an information in the nature of a *quo warranto*. *Gregg v. Goodrich*, 67 N. H. 543, 42 Atl. 240.

"The case of *State ex rel. v. Giovanoni*, 59 Mo. App. 41, cited and relied on by Vogel is not the law, and is not supported by any text writer or decided case that has ever come under our notice. The opinion rests upon the erroneous assumption that the municipal assembly of the City of St. Louis is a subordinate tribunal. The charters of incorporated municipalities are their constitutions, and the municipal councils are miniature general assemblies (*St. Louis v. Foster*, 52 Mo. 513); and the ordinances duly enacted, and which are authorized by their charter have the force and effect of legislative acts, within the boundaries of the city (*Jackson v. Grand Ave R. R. Co.*, 118 Mo. 119, 24 S. W. 192; *Union Depot Com-*

council both a board of canvassers to inspect the returns of the election boards, also a tribunal that, on a sufficient showing of probable fraud or irregularity, may order a recount of votes, hear evidence applicable to the points in dispute, and determine who is entitled to be seated as a member.<sup>86</sup> The council may be compelled, at the insistence of any candidate claiming to have been elected, by *mandamus* to perform that duty.<sup>87</sup>

A contest before the council had passed any ordinance or made any provision for carrying on or determining such contest is not a bar to subsequent proceedings in *quo warranto*.<sup>88</sup>

pany v. Southern R. R. Co., 105 Mo. 562, 16 S. W. 920); and when a municipal assembly or council acts within the sphere of its authority, its discretion is as wide as that possessed by the general assembly of the state, and is as free from judicial interference. State ex rel. v. Schweickhardt, 109 Mo. 496, 19 S. W. 47; Ferrenbach v. Turner, 86 Mo. 416; Taylor v. Carondelet, 22 Mo. 105; St. Louis v. McCoy, 18 Mo. 238; Knapp v. Kansas City, 48 Mo. App. 485; Marionville v. Henson, 65 Mo. 397. The legislative department of an incorporated municipality is not a tribunal subordinate to the judiciary, but is, within its legitimate sphere, a co-ordinate branch of government, independent of the courts as to all matters committed to its judgment and discretion by the charter which gave it birth, and its discretion as to matters within the sphere of its authority is as free from the supervision and control of the courts as is the exercise by the General Assembly of the discretion committed to it by the

Constitution of the state. Both are co-ordinate branches of government, the one established by the Constitution, the other by charter. It matters not, therefore, for what reason, or, however arbitrarily or irregularly the house of delegates acted in the contest between Vogel and Sheridan, the courts are without jurisdiction to revise its judgment in the premises." State ex rel. Vogel v. Bersch, 83 Mo. 657, 668, 669.

86. State ex rel. v. Rahway, 33 N. J. L. 111.

87. State ex rel. v. Rahway, 33 N. J. L. 111.

88. State v. Morris, 14 Wash. 262, 44 Pac. 266.

The council cannot be controlled by *mandamus* in determining the qualifications of one of its own members. State ex rel. v. Bersch, 83 Mo. App. 657.

*Mandamus* will not lie to compel the reinstatement of a contesting candidate, without a proper hearing on the merits. People v. Fitzgerald, 41 Mich. 2; Alter v. Simpson, 46 Mich. 138.



Other cases support the view that notwithstanding such provisions the jurisdiction of the court remains and that of the special tribunal is concurrent, temporary and subordinate, and, therefore the council, like all other special statutory tribunals, is subject to the supervisory jurisdiction of the courts when it departs from or exceeds the express terms of the power given in the charter; that a city council has not the same exclusive authority as that exercised by the congress or state legislature.<sup>89</sup>

Notwithstanding the exclusive jurisdiction of the special tribunal in the manner indicated the rule is established that courts may determine whether there was an office or vacancy to be filled, as where one claims to be elected from a ward having no existence,<sup>90</sup> or to an office already legally occupied.<sup>91</sup>

A council made by the charter the sole judge of the election and qualifications of its members having once investigated and seated a member cannot, at a subsequent meeting, order a reconsideration.<sup>92</sup> The power expires with the council which admits the member.<sup>93</sup> So where a council having canvassed the returns and determined and declared the result in an election of mayor its power in this respect is exhausted and it has no right to make

89. *Alabama*. Wammacks v. Holloway, 2 Ala. 31.

*Delaware*. State v. Wilmington, 3 Harrington (Del.) 294.

*Michigan*. People v. Cicatte, 16 Mich. 283, dissenting opinion.

*Missouri*. State ex rel. v. Fitzgerald, 44 Mo. 425; State ex rel. v. Giovanoni, 59 Mo. App. 41, 43, but disapproved in State ex rel. v. Bersch, 83 Mo. App. 657, 668.

*New Jersey*. See State v. Governor, 25 N. J. L. 331.

*New York*. People ex rel. v. Hale, 80 N. Y. 117; People v. Hull, 64 Hun (N. Y.) 638.

*Pennsylvania*. Commissioner v. Allen, 70 Pa. St. 465.

90. State ex rel. v. O'Brien, 47 Ohio St. 466, 34 Am. & Eng. Corp. Cas. 361.

91. Commonwealth v. Messer, 44 Pa. St. 341.

92. Kendall v. Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

93. Doran v. DeLong, 48 Mich. 552, 12 N. W. 848.

another canvas at a subsequent day with a different result.<sup>94</sup>

### § 472. Contesting elections in the courts.

Aside from the right of the legislative body of the municipal corporation to determine the election and qualification of the officers considered in the last section the laws usually provide for election contests in the courts.<sup>95</sup>

### § 473. Acceptance of office—compelling acceptance.

The election of a person to an office constitutes the essence of his appointment; but the office cannot be considered as actually filled until his acceptance, either express or implied,<sup>96</sup> as by entering upon the duties of the office.<sup>97</sup>

Refusal to accept an office was an offense, and indictable at common law.<sup>98</sup> It is held in numerous English cases that the refusal of a person to accept and serve in an office to which he has been duly elected is indictable.<sup>99</sup> And such seems to be the law in the United

94. *Hadley v. Albany*, 33 N. Y. 603; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72, 78.

95. **Contesting elections in the courts.** Validity of an election to office by a board of mayor and aldermen may be contested in Tennessee and inquired into in any proceeding by *mandamus*. *Lawrence v. Ingersoll*, 88 Tenn. 52, 55, 6 L. R. A. 308, 17 Am. St. Rep. 870, 12 S. W. 422.

Council has power to determine contest for mayor. *Booth v. Arapohoe County Court*, 18 Colo. 561, 33 Pac. 581.

Cannot be reviewed by court when legislative body is not a

party and where its record is not before the court. *People v. Hall*, 58 How. Prac. (N. Y.) 147.

96. *Johnson v. Wilson*, 2 N. H. 202.

97. *Smith v. Moore*, 90 Ind. 294.

98. *Hinze v. People*, 92 Ill. 406.

99. *Rex v. Lone*, 2 Strange 920; *Rex v. Jones*, 2 Strange 1146; *Rex v. Larwood*, 4 Mod. 270; *Rex v. Burder*, 4 T. R. 778; *Rex v. Bower*, 1 N. & C. 492, 585, 2 Dowl. & R. 761, 842.

See *Arnold's Mun. Corp.* (5th Ed., London), p. 62 and notes; *Willcock, Mun. Corp.* 71; *Angell & Ames, Corp.* 352.

States.<sup>1</sup> But it is declared in Illinois that "no man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation."<sup>2</sup>

In England it has been held that a municipal corporation may prescribe by by-law a pecuniary penalty for refusal to accept an office to which one has been legally elected.<sup>3</sup> The English Municipal Corporation Act so provides.<sup>4</sup>

One who has been duly elected to a municipal office which he is qualified to serve may be compelled by *mandamus* to accept and execute the same.<sup>5</sup> Even though he has paid the fine imposed by a by-law for refusing to serve.<sup>6</sup> But one who has incurred a penalty imposed by statute for refusing to serve in an office to which he has been appointed cannot be made liable for a second penalty for the second refusal to serve.<sup>7</sup>

#### § 474. Qualifying to perform duties of office.

Usually the person elected or appointed is required to take certain steps or do certain acts before actually

1. State ex rel. v. Ferguson, 31 N. J. L. 107; People v. Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. R. 514, 24 L. R. A. 492.

See Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314.

Contra, State v. McEntyre, 3 Ired. (25 N. C.) 171.

**Refusal of a citizen of a municipality to accept office may be made an indictable offense by legislative enactment.** State v. McEntyre, 25 N. C. (3 Ired.) 171; London v. Headen, 76 N. C. 72.

2. Hinze v People, 92 Ill. 406, 425.

3. § 361 ante; London v. Vacker, 1 Ld. Rayne 496, 5 Mod. 438, 12 Mod. 269, Carth. 480, Holt 431; Exeter v. Stane, 2 Show. K. B. 159; 2 McQ—9

Rex v. Lorwood, 1 Salk. 167, 168, 3 Salk. 134; Anonymous, 11 Mod. 132; Reg v. Hungerford, Id. 142.

See Edwards v. U. S. 103 U. S. 471, 26 L. Ed. 314; Reg v. Richmond, 11 Week. Rep. 65.

4. 45 and 46 Vict. ch. 50, § 34.

5. Regina v. Hungerford, 11 Mod. 142; Rex v. Bower, 1 Barn & C. 585, 2 Dorol. & R. 761, 842; Rex v. Bedford, 1 East. 79; Rex v. Leyland, 3 M. V. S. 184; Rex v. Grosvenor, 2 Str. 1193, 1 Wils. 18; Rex v. Whitwell, 5 T. R. 85; People v. Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492.

6. Rex v. Bower, 1 Barn. & C. 585.

7. Haywood v. Wheelles, 11 Johns. (N. Y.) 431.

assuming office. These steps or acts are usually prescribed by law. The general rule is that it is necessary to qualify in order to enable the officer to exercise the functions appertaining to the office.<sup>8</sup> It is sometimes held that an officer is not entitled to his salary unless he qualifies.<sup>9</sup>

Laws ordinarily prescribe the time in which the officer shall qualify, as by taking the oath of office, and providing an official bond.<sup>10</sup> Such laws have been held mandatory and failure to qualify within the time named is a forfeiture of the office.<sup>11</sup> Whether laws of this character should be so construed, will depend, of course on the language and intent of the particular law involved.<sup>12</sup>

One may qualify as an officer after the time for the same has passed where his disqualification to hold office has been removed after such time.<sup>13</sup> Under a provision that, where one elected fails to qualify within a specified time he shall be deemed to have declined and the office shall be considered vacant, it was held that where two candidates for the office receive the same number of votes it is not necessary that either should qualify before the result of the election has been determined.<sup>14</sup>

8. *State v. Matheny*, 7 Kan. 327; *Haynes v. Washington Co.*, 19 Ill. 66; *Douglass v. Essex County*, 38 N. J. L. 214; *Courser v. Powers*, 34 Vt. 517.

9. *State v. Eshelby*, 2 Ohio Cir. Ct. Rep. 488, 1 Ohio Cir. Dec. 592; *Philadelphia v. Given*, 60 Pa. St. 136.

10. *People v. Callaghan*, 93 Ill. 128; *State v. Wadhams*, 64 Minn. 318, 67 N. W. 64; *Howell v. Com.* 97 Pa. St. 332.

11. *Payne v. San Francisco*, 3 Cal. 122; *Johnson v. Mann*, 77 Va. 265; *Vaughn v. Johnson*, 77 Va. 300; *Branham v. Long*, 78 Va. 352.

12. *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182. *Examine Throop, Pub. Off.*, § 173.

13. *State v. Trumpf*, 50 Wis. 113, 5 N. W. 876, 6 N. W. 512.

Failure to qualify as ground of forfeiture. *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405; *Kriseler v. Le Valley*, 122 Mich. 576, 81 N. W. 580; *People v. Mt. Vernon*, 128 N. Y. 657, 29 N. E. 148, affirming 59 Hun 204, 13 N. Y. S. 447.

14. *State v. Kraft*, 20 Or. 28, 23 Pac. 663.

Failure to file certificate of appointment does not render official acts void. *Kiley v. Forsee*, 57 Mo. 390.

## § 475. Same—oath, failure to take.

Some cases construe the provision requiring the oath of office to be taken within a specified time to be directory only while others declare it to be mandatory. This, of course, must depend upon the proper construction to be given to the law involved. If the taking of the oath is by the terms of the law made a condition precedent to performing the functions of the office, it would seem that the officer has no right to the office until the oath is taken.<sup>15</sup> But, if the law merely provides that the oath shall be taken within a specified time after the election or appointment, without more, failure to do so, would not work a forfeiture of the office; it may be taken after the time named.<sup>16</sup> So, if failure in this respect should be due, not to the fault of the officer, but to the one who is to

**15. Oath—failure to take with-** in prescribed time renders office vacant. *Douglass v. Essex Co.*, 38 N. J. L. 214; *Branham v. Long*, 78 Va. 352; *People v. McKinney*, 52 N. Y. 374.

A person elected to the office of councilman who failed to take the oath prescribed by statute, never obtained title to the office. *Hayter v. Benner*, 67 N. J. L. 359, 52 Atl. 351.

Law so prescribed. *People v. Callaghan*, 83 Ill. 128.

**Oath does not confer office.** A candidate without even a *prima facie* right to municipal office cannot give himself the right to the office by taking the oath. *Walker v. Quillian*, 118 Ga. 152, 44 S. E. 987.

**16. People v. Mt. Vernon**, 59 Hun (N. Y.) 204, 13 N. Y. S. 447.

May be taken after time prescribed. *Davidson v. State*, 68 Ala. 356; *Caskey v. Greensburgh*, 78 Ind. 234, 237; *Smith v. Cronkhite*, 8 Ind. 134; *State v. Ruff*, 4 Wash. 234, 16 L. R. A. 140, 29 Pac. 999; *Kearney v. Andrews*, 10 N. J. Eq. 70, 74; *State v. Findley*, 10 Ohio 51, 59.

Under a law providing that officers, theretofore elected, who have, prior to the commencement of their terms, taken and filed their oath of office, shall be fully qualified, a mayor who takes the oath of office more than ten days after his election is fully qualified notwithstanding a prior statute required him to take such oath within ten days after election. *Atty. Gen. v. Petty*, 73 N. J. L. 333, 63 Atl. 911.

administer the oath, it does not appear reasonable to inflict the penalty on the officer.<sup>17</sup>

If the law prescribes the form of the oath it should be followed, at least in substance.<sup>18</sup>

Only the officer designated in the law is authorized to administer the oath;<sup>19</sup> however, if administered by another officer empowered to administer an oath, the title of the officer is not affected thereby.<sup>20</sup>

### § 476. Same—bond—failure to give.

The legal provisions touching the giving of an official bond, the condition, the amount, the sureties, the time when the same shall be given and the time and the place of the filing thereof should, in substance, be observed.<sup>21</sup>

17. *In re Fitzgerald*, 82 N. Y. S. 811, 88 App. Div. 434.

Failure due to another. Where failure to take the oath within the time prescribed is due to the refusal of the officer designated to administer it the office does not become vacant. *State v. Kraft*, 20 Or. 28, 23 Pac. 663.

Where the mayor refuses to administer to a police captain the oath of office when requested within the time required by the code he may, after the expiration of such time, be compelled to do so. *Huey v. Jones*, 140 Ala. 479, 37 So. 193.

Ineligibility of officer is insufficient ground for refusal to administer the oath. *People v. Dean*, 3 Wend. (N. Y.) 438.

18. *Davis v. Berger*, 54 Mich. 692; *State v. Trenton*, 35 N. J. L. 485; *Bassett v. Denn*, 17 N. J. L. 432; *Olney v. Pierce*, 1 R. I. 292.

Sufficiency of oath. *Hayter v. Benner*, 67 N. J. L. 359, 52 Atl. 351; *Helbeck v. New York*, 10 Abb. Pr. (N. Y.) 439; *In re Cambria St.*,

75 Pa. St. 357; *Bohlman v. Green Bay, etc. R. R. Co.*, 40 Wis. 157.

Manner of taking oath. *Odiorne v. Rand*, 59 N. H. 504.

19. Where the charter requires a city official to take the official oath before the council it is not sufficient for him to take it before the mayor alone. *Bullock v. Biggs*, 78 N. J. L. 63, 65, 73 Atl. 69.

20. *State v. Kennedy*, 69 Conn. 220, 37 Atl. 503; *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430; *Ex parte Heath*, 3 Hill (N. Y.) 42; *State v. Walthaus*, 64 Minn. 318, 67 N. W. 64.

Who authorized to administer oath under particular provisions. *Drew v. Dorrill*, 62 N. H. 23; *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456.

Evidence of having taken oath. *Halbeck v. New York*, 10 Abb. Pr. (N. Y.) 439.

21. *Hecht v. Coale*, 93 Md. 692, 49 Atl. 660; *Somerville v. Wood*, 129 Ala. 369, 30 So. 280.

However, this matter depends upon the language of the law in question and the proper construction to be given to it, and also the cause of failure, as will appear from an examination of the decisions growing out of various legal provisions. Under particular laws some cases hold that the failure to give bond within the time named does not constitute a forfeiture of the office; it may be given after the expiration of the time.<sup>22</sup> On the other hand,

22. *Pryor v. Rochester*, 68 N. Y. S. 86, 57 App. Div. 486; *State v. Porter*, 7 Ind. 204; *Knox County v. Johnson*, 124 Ind. 145, 7 L. R. A. 684; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *State v. Shannon*, 132 Mo. 139.

**Bond—failure to give**, authorizes the council to vacate, but the office is not vacated until action by the council. The execution of a proper bond is not a condition precedent to the right to an office. *Houston v. Estes*, 35 Tex. Civ. App. 99, 79 S. W. 848; *Houston v. Clark* (Tex. Civ. App.), 80 S. W. 1198; *Houston v. Frazer*, 80 S. W. 1198; *Kriseler v. Le Valley*, 122 Mich. 576, 81 N. W. 580.

Under a statute providing that where an officer fails to give bond within fifteen days from the date of his appointment, he will be deemed to have declined the office, an officer who files a bond within the required time, cannot be deprived of the office as against his predecessor, though the council failed to approve the bond within fifteen days. *In re Fitzgerald*, 82 N. Y. S. 811, 88 App. Div. 434.

Failure to give bond does not confer upon the city power to declare the office vacant in the absence of express power to such

effect. *Central City v. Sears*, 2 Colo. 588.

Mere failure of council to approve bond will not work forfeiture of office. *State v. Barnes*, 51 Kan. 688, 33 Pac. 621.

Mere failure or refusal to approve bond in particular cases. *Speed v. Detroit*, 97 Mich. 198, 56 N. W. 570; *Atty. Gen. v. Corliss*, 98 Mich. 372, 57 N. W. 410; *Commonwealth v. Pittsburgh*, 15 Pitts. Leg. J. (Pa.) 337.

Provisions as to time of giving bond, held directory and authorized the city to waive both and accept bond thereafter. *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, reversing 2 Ill. App. 332.

Failure to give bond within the time required, held a mere cause of forfeiture which may be waived by subsequent acceptance of the bond. *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405.

When no bond is required, failure to give does not disqualify. *Quimby v. Wood*, 19 R. I. 571, 35 Atl. 149.

The failure of an officer elected by the council to give bond within the time required by law, owing to the action of the council in declaring there was no election, does not deprive such officer of his

under some laws the failure to give bond has been construed to constitute a vacancy of the office.<sup>23</sup>

right to the office. *Murdoch v. Strange*, 99 Md. 89, 57 Atl. 628.

**De facto officer.** Although a city engineer did not take the oath of office and file a bond as required by law, where he assumed and performed the duties of his office, held that his acts in the construction of a sewer were valid as against a tax payer seeking to avoid the sewer tax. *Akers v. Kolkmeyer*, 97 Mo. App. 520, 71 S. W. 536.

See *Landes v. Walls*, 160 Ind. 217, 66 N. E. 679; *Keeling v. Pittsburg, V. & C. Ry. Co.*, 205 Pa. 31, 54 Atl. 485.

23. *Lynan v. Com. (Ky.)*, 55 S. W. 686; *Creighton v. Com.*, 83 Ky. 142, 4 Am. St. 143; *De Lacey v. Brooklyn*, 12 N. Y. S. 540.

**Bond required.** Giving bond and having same approved, held to be condition precedent to the right to exercise the powers and receive the emoluments. *Howell v. Commonwealth*, 97 Pa. St. 332.

Failure to qualify by giving bond and having same duly approved, deprives officer of compensation. *Philadelphia v. Given*, 60 Pa. St. 136. See *Wyoming v. Wilkesbarre, etc. R. R. Co.*, 8 Kulp (Pa.) 113; *Natchitoches v. Redmond*, 28 La. Am. 274.

**Bonds of officers, form and validity.** The bond of a fidelity and guaranty company against the fraud and dishonesty of a city treasurer is a voluntary, and not a statutory bond. *Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. 754.

And where the treasurer joins

in such bond merely as an obligation to save the company harmless, and makes no promise or covenant to the city, such treasurer is not jointly liable with the company on the bond. *Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. 754.

Where a municipal officer is required by charter to give a bond, payable to the mayor and council, but the bond is by mistake made payable to a named person, described as mayor, and to his successors in office, such bond is good only as a voluntary common law bond and not as a statutory bond. *Anderson v. Blair*, 118 Ga. 733, 45 S. E. 28.

The official bond of a city officer for the faithful discharge of his official duties, including the acts of his deputies and assistants, is not affected by civil service rules for the election, selection and appointment of such officers. *Butler v. Milwaukee*, 119 Wis. 526, 97 N. W. 185.

The variance between a town collector's bond conditioned, etc., pursuant to law and the board of trustees of the town and the special charter of the town requiring the collector to execute a bond conditioned that he will pay over and account for all moneys that may come into his hands as collector and will discharge the duties of his office is not of such a substantial character as to destroy the instrument as a statutory bond. *Cicero v. Hall*, 240 Ill. 160, 164, 88 N. E. 476.



§ 477. When term of office begins.

The term of office begins of course, on the date prescribed by law,<sup>24</sup> but if the law is silent on this point, it commences when the officer qualifies in the manner provided, as by giving bond,<sup>25</sup> or taking the oath of office.<sup>26</sup>

§ 478. When vacancy in office exists.

When once legally filled, the office does not become vacant until, (1) the term expires,<sup>27</sup> or, (2) the office is legally abolished,<sup>28</sup> or, (3) the incumbent dies, or, (4)

24. *State v. Jones*, 27 La. Ann. 179; *Blakely v. Nowrey*, 68 N. J. L. 95, 52 Atl. 289.

If the beginning of the term is fixed by the State Constitution, of course, it cannot be varied by statute. *People v. Fitzgerald*, 180 N. Y. 269, 73 N. E. 55, affirming 96 N. Y. App. Div. 242, 89 N. Y. S. 268.

25. § 476 *ante*.

26. § 475 *ante*.

*People v. Callaghan*, 83 Ill. 128.

When term begins. Where charter or law is silent as to beginning, the term begins on the day of appointment. *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *Haight v. Love*, 39 N. J. L. 476, 23 Am. Rep. 234.

The terms of officers elected by a council begin on the day of the first regular meeting of the council when elected on such day. *State ex rel. v. Jones*, 27 La. Ann. 179.

Commencement of term in particular cases. *Alexander v. McKenzie*, 2 S. C. 81; *People v. Brenham*, 3 Cal. 477.

27. See § 486 *et seq. post*.

Expiration of term. Under a statute providing that no election for members of the council shall be held in any ward having four members until the number of members from such ward shall be reduced to three, no vacancy can exist in such a ward until the expiration of the term of a second councilman, and an election held prior to the expiration of the term of one of the four members is invalid. *Lilly v. Krause*, 30 Pa. Super. Ct. 412.

The vacancy created in an office by the expiration of a fixed term is not prevented by civil service laws prohibiting removals of employees except for misconduct, etc. *In re Tiffany*, 179 N. Y. 455, 72 N. E. 512, affirming 84 N. Y. S. 1148.

Vacancy exists when incumbent holds beyond term. *State v. Thomas*, 102 Mo. 85, 14 S. W. 108.

28. § 494 *post*.

resigns,<sup>29</sup> or, (5) is legally removed,<sup>30</sup> or (6) fails to continue to possess the qualifications prescribed by law.<sup>31</sup>

An office is vacant within legal intendment and for all purposes of election, or appointment as well, when the official term of the occupant has expired, as in case of his death, resignation or removal, provided provision is made by law for filling the office by such appointment or election.<sup>32</sup>

### § 479. What authority to fill vacancy.

When a vacancy in an office or public place occurs, it can only be legally filled by the authority prescribed by

29. §§ 495 to 498 *post*.

Abandonment or resignation of an office usually creates a vacancy. *People v. Hanafan*, 96 Ill. 420.

It has been held that in the absence of legal provisions to the contrary, the resignation of an officer to take effect at a time specified creates a vacancy at that time, though the resignation has not been accepted where acceptance is not expressly required. *Reiter v. State*, 51 Ohio St. 74, 23 L. R. A. 681, 36 N. E. 943.

A resignation to take effect at a future day, does not create a present vacancy. *Biddle v. Willard*, 10 Ind. 63.

30. *Johnson v. Wilson*, 2 N. H. 202.

§ 551 *et seq. post*.

31. **Qualifications ceasing.** Ceasing to be resident of corporation may constitute resignation. *People v. Highland Park*, 88 Mich. 653; *People v. Morrell*, 21 Ward. 575.

Not resident of city. No appointment—office vacant. *People v. Merrick*, 61 Hun (N. Y.) 396, 16 N. Y. S. 246.

32. *State ex rel. v. Thomas*, 102 Mo. 85, 14 S. W. 108, overruling *State v. Lusk*, 18 Mo. 333; *State v. Stonestreet*, 99 Mo. 361, 12 S. W. 895; *State v. Seavy*, 64 Mo. 89; *State v. Jenkins*, 43 Mo. 261.

**Vacancy.** When vacancy caused by some event by which duties of office were no longer discharged. *People v. Edwards*, 93 Cal. 153, 28 Pac. 831; *People v. Hammond*, 66 Cal. 654, 6 Pac. 741.

A statute which provides that a municipal office "shall be declared vacant" upon the happening of a certain contingency, is not self-executing, but the board or body declaring such vacancy must first find the existence of the fact upon which the vacancy is declared before it can fill the vacancy. *Kindrick v. Nelson*, 13 Idaho 244, 89 Pac. 755.

law, as a council, board, commission, or an officer,<sup>33</sup> or by popular election.<sup>34</sup>

Vacancies in office other than purely municipal are usually filled by a state agency, as by the governor. Thus in Philadelphia, the office of city comptroller is regarded as a county office, and, hence, a vacancy therein is filled by the governor and not by the city council.<sup>35</sup>

In the absence of constitutional restrictions, laws occasionally confer power on the governor of the state to fill vacancies in municipal offices, e. g., mayor, but a vacancy in the office of mayor cannot be filled by the governor by appointment under a general law authorizing him to fill vacancies in municipal offices where the municipal charter provides that a vacancy in the office of mayor shall be filled by election.<sup>36</sup> Frequently the mayor is empowered to fill vacancies in municipal offices.<sup>37</sup> Sometimes the council has power to fill vacancies,<sup>38</sup> as

33. Who to fill, particular case. *State v. Fowler*, 66 Conn. 294, 32 Atl. 162; *Traynor v. Beckham*, 25 Ky. Law Rep. 283, 74 S. W. 1105.

34. *State v. Schroeder*, 79 Neb. 759, 113 N. W. 192.

35. *Commonwealth v. Oellers*, 140 Pa. St. 457, 21 Atl. 1085; *Taggart v. Commonwealth*, 102 Pa. St. 354.

36. *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345.

37. *Moreland v. Miller*, 126 Mich. 381, 25 N. W. 882, 8 Detroit Leg. N. 50.

Where the legislature has power under the constitution to provide for the temporary filling of a vacancy in a municipal office by appointment by the mayor, and it exceeds its power by providing for the permanent filling of the vacancy, such appointments will be valid to the extent of its con-

stitutionality. *Watson v. McGrath*, 111 La. 1097, 36 So. 204.

38. *Douglass v. Essex Co.*, 38 N. J. L. 214.

**Council.** Under a charter providing that all vacancies in the office of councilman shall be filled by the council, the council has power to fill a vacancy by the forming of new wards. *Landes v. Wall*, 160 Ind. 217, 66 N. E. 67y.

Where power to fill a vacancy in a board of village trustees is conferred by statute on the council and a vacancy therein was filled by election and approved by such council the action of the council in approving such selection amounts to an appointment although the election is void and such officer was a *de jure* officer. *People ex rel. v. Ford*, 163 Mich. 359, 17 Detroit Leg. N. 817, 128 N. W. 234.

in the office of mayor,<sup>39</sup> directly by appointment or election, or this body may order a popular election for this purpose.<sup>40</sup>

A law providing that in case of a vacancy in the office of councilman through death, resignation or other cause, the council shall fill such vacancy *by a special* election does not apply to a failure to elect an officer owing to a tie vote, in which case a special election should be held.<sup>41</sup>

If the time within which the vacancy is to be filled is limited by law, failure of the council to act within such time destroys its right to fill the vacancy thereafter; as where failure to act within a named time confers power of appointment upon mayor.<sup>42</sup>

Where the council is authorized to fill a vacancy, and the law does not prescribe the manner in which it shall be filled, the manner of appointment may be made by resolution or motion or by ballot or *viva voce* vote.<sup>43</sup> In such case where appointment is made by resolution, approval of such resolution on the part of the mayor is not required.<sup>44</sup>

Vacancies that did not exist during the term of an outgoing board cannot be filled by such board.<sup>45</sup> The power of appointment belongs to the board which would be in existence when the office became vacant.<sup>46</sup>

39. Vaughn v. Johnson, 77 Va. 300.

40. Mitchell v. Witt, 98 Va. 459.

41. State v. Ives, 167 Ind. 13, 78 N. E. 225.

42. People v. Merrick, 61 Hun 396, 16 N. Y. S. 246.

43. State v. Wagner, 170 Ind. 144, 82 N. E. 466.

44. By council—mode. A statute providing that no ordinance, order or resolution of the common council shall become a law or operative until approved by the mayor or passed over his veto does not confer upon the mayor power to veto a resolution making

an appointment to fill a vacancy in the council. State v. Wagner, 170 Ind. 144, 82 N. E. 466.

Under a statute authorizing the council to fill all vacancies in any office to which they have power to elect, a vote of the council declaring such an office vacant has the effect of removing the incumbent. Atty. Gen. v. Remick, 71 N. H. 480, 53 Atl. 308.

45. Fitch v. Smith, 57 N. J. L. (28 Vroom) 526, 34 Atl. 1058.

46. Bownes v. Meehan, 45 N. J. L. (16 Vroom) 189.

See § 462 *ante*.

## 6. DE FACTO OFFICERS.

## § 480. De facto officer described.

An officer *de facto* is one who has a reputation of being, but who in law is not, an officer.<sup>47</sup> Where there is an office all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be.<sup>48</sup> Thus where vacancies in the council are improperly filled by the council, the appointees, having qualified and acted, are *de facto* officers whose acts are binding on the public.<sup>49</sup> So persons acting, without appointment, with the acquiescence of the mayor and council, as peace officers, and receiving pay therefor, and who are regarded as officers by the general public are *de facto* officers.<sup>50</sup> So members of a board of trustees elected under a patent, granted to the town, and creating such board, are officers *de facto* while having possession of the corporate seal, and their acts are binding on the town as to third persons.<sup>51</sup> Likewise a water commissioner

47. *Fleming v. Mulhall*, 9 Mo. App. 71; *Tucker v. Aiken*, 7 N. H. 113.

48. *State v. Messervy*, 86 S. C. 501, 68 S. E. 766; *Coquillard Wagon Works v. Melton* (Ky. 1910), 125 S. W. 291; *Lavin v. Board of Comr's*, 245 Ill. 496, 92 N. E. 291; *Rosetto v. Bay St. Louis* (Miss. 1910), 52 So. 785.

Where *de facto* officer exists. "Where the law has provided that an office may be filled legally then the acts of an incumbent may be valid although not lawfully appointed, because the public, being bound to know the law, know that somebody may or should fill the

place and perform the duties; and possession would as to them be evidence of title. But where the law itself negatives the idea that there can be a legal incumbent, any one assuming to act assumes what every one is bound to know is not a legal office, and his acts cannot be effectual for any purpose." *Carleton v. People*, 10 Mich. 250, 258, per Campbell, J.

49. *Overall v. Madisonville*, 31 Ky. L. Rep. 278, 102 S. W. 278.

50. *Ex parte Tracey* (Tex. Crim. App., 1905), 93 S. W. 538.

51. *People v. Lester*, 93 N. Y. S. 830, 106 App. Div. 61.

verbally appointed by the board of trustees is an officer *de facto* for the purpose of making an assessment.<sup>52</sup>

Where a city council is abolished by statute, and a municipal assembly created, the members of which are to be elected at a future day, the members of the council are *de facto* officers, and an ordinance passed after the enactment of such statute is valid.<sup>53</sup> So where a person is duly appointed but fails to qualify by failing to take the oath of office, or give bond, he is a *de facto* officer.<sup>54</sup> So the appointee to a vacant office is at least a *de facto* officer where, being appointed by the authorized ministerial officer, he qualifies, acts, and is publicly recognized.<sup>55</sup> So where an ordinance authorizes the appointment of an officer by the mayor and marshal, his commission, signed by the mayor, is presumptive evidence of the concurrence of the marshal in his appointment, and hence, he is a *de facto* officer.<sup>56</sup>

When the appointing power has made an appointment of a person who has not the qualifications required by law, the appointment is not therefore void. The person appointed is *de facto* an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation and may be punished for acting without being qualified; but the peace and repose of society require that his official acts so far as others are concerned should be valid. This is true of all officers.<sup>57</sup>

52. *Canaseraga v. Green*, 88 N. Y. S. 539.

53. *Hilgert v. Barber Asphalt Pav. Co.*, 107 Mo. App. 385, 81 S. W. 496.

54. *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286; *State ex rel. v. Board of Education*, 108 Mo. 235, 18 S. W. 782; *State v. Swinney*, 25 Mo. App. 347; *Akers v. Kolkmeyer*, 97 Mo. App. 520, 71 S. W. 536.

55. *State ex rel. v. McCann*, 11 Mo. App. 596, 81 Mo. 479.

As to appointments by *de facto* officers, see *State v. Carroll*, 38 Conn. 449, leading modern case on this subject.

56. *Westberg v. Kansas City*, 64 Mo. 493.

57. *Wilson v. Kimmel*, 109 Mo. S. W. 260; *County Court v. Sparks*, 10 Mo. 118; *State v. Anderson*, 1 N. J. L. (Coxe) 318; *Carrigan v. Buryea*, 40 N. J. L. 266.

# § 481. Mere intruders are not de facto officers.

Where the charter requires officers to be elected, persons who were never elected must be considered mere

**De facto officers, who are, and who are not.**

*Alabama.* Butler v. Walker, 98 Ala. 358, 39 Am. St. Rep. 61, 13 So. 261.

*California.* People v. Hecht, 105 Cal. 621, 27 L. R. A. 203.

*Connecticut.* State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 563.

*Kansas.* Hale v. Bischoff, 53 Kan. 301, 36 Pac. 752.

*Kentucky.* Hildreth v. McIntire, 1 J. J. Marsh. (Ky.) 206.

*Michigan.* Hallgren v. Campbell, 82 Mich. 255, 9 L. R. A. 408.

*Minnesota.* Burt v. Winona, etc. Ry. Co., 31 Minn. 472.

*Mississippi.* Dabney v. Hudson, 68 Miss. 262, 24 Am. St. Rep. 276.

*New Jersey.* State v. Atlantic City, 52 N. J. L. 332, 8 L. R. A. 697.

*New York.* Morgan v. Quackenbush, 22 Barb. (N. Y.) 72; People v. White, 24 Wend. 520, 540.

*South Carolina.* Tinsley v. Kirby, 17 S. C. 1.

*United States.* Norton v. Shelby County, 118 U. S. 425, 441, 6 Sup. Ct. 1121, 30 L. Ed. 178.

**De facto officers described and illustrated.** During the interval between the election which resulted in the separation of the County and City of St. Louis and the judicial ascertainment and official promulgation of that result, the recorder of deeds for St. Louis county remained the *de facto* recorder for both the city and the

county. Priest v. Lawrence, 16 Mo. App. 409.

Where two officers claim the right to execute the process of court, the officer to whom the court directs its writs will be a *de facto* officer, and must be respected and obeyed as such. State ex rel. v. Laughlin, 7 Mo. App. 529.

A petition for *mandamus* to compel the restoration of the petitioner to office, which shows that petitioner was only a *de facto* officer, is insufficient to state a cause of action. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155.

The title as officers *de facto* of appointees to the city council appointed under an ordinance creating new wards, in possession of certificates from the appointing power, and who have held the office for several months, cannot be attacked by a suit in equity pending the determination of their title *de jure*. Landes v. Walls, 160 Ind. 216, 66 N. E. 679.

Where a deputy marshal was acting as an officer *de facto* under an appointment, in an action on his bond, he cannot deny that he was an officer *de jure*. State v. Frentress, 37 Ind. App. 245, 76 N. E. 821.

Statutes prescribing forfeiture of office for bribery applies to *de facto*, as well as to *de jure* officers. Com. v. Walton, 201 Mass. 81, 87 N. E. 202.

intruders or usurpers and the fact of their acting raises no presumption of regular induction into office.<sup>59</sup> So a person appointed, for example, by the county court as an additional constable in a township in which the office is filled by one whose tenure is undisputed is not an officer *de jure* or *de facto*.<sup>60</sup> So where the appointment to the office is not merely irregular or informal, but is absolutely void, as by a council alone, when it should be made by the mayor and council, the appointee, though attempting to discharge the duties of the office, is not an officer *de facto* but a mere intruder.<sup>61</sup>

§ 482. There can be no *de facto* officer where there is no corresponding office known to the law.

This is the doctrine usually applied.<sup>62</sup> Hence, the general rule that the acts of an officer *de facto* are valid,

"An office is full *de facto* when it is occupied by one by virtue of an appointment or election, giving a color of title, even though such appointment or election cannot be sustained in law." *State v. Hempstead*, 83 Conn. 554, 78 Atl. 442; *Leeds v. Atlantic City*, 52 N. J. L. 334, 19 Atl. 780, 8 L. R. A. 697; *La Chance v. Mackinac County Canvassers*, 157 Mich. 679, 122 N. W. 271.

59. *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Creighton v. Com.*, 83 Ky. 147, 4 Am. St. Rep. 143; *Somerset v. Somerset Bank*, 109 Ky. 549, 22 Ky. Law Rep. 1129, 60 S. W. 5; *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176.

59. *Keeler v. New Bern*, 61 N. C. 505.

60. *Jester v. Spurgeon*, 27 Mo. App. 477, 480.

61. *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874; *Bien-court v. Parker*, 27 Tex. 558; *Land Co. v. Laigle*, 59 Tex. 344.

62. No officer *de facto* without an office *de jure*.

*Illinois*. *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Ward v. Cook*, 78 Ill. App. 111.

*Kansas*. *In re Kinkle*, 31 Kan. 712, 3 Pac. 531.

*Kentucky*. *Hildreth v. McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61.

*Louisiana*. *State v. McFarland*, 25 La. Ann. 547.

*New York*. *In re Quinn*, 152 N. Y. 89, 46 N. E. 175.

*United States*. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 20 L. Ed. 178.



has no application where the office itself does not exist.<sup>63</sup> For example, a person appointed by a city for no definite period to perform engineering duties at a *per diem* wage is not a *de facto* officer where the office of city engineer had never been created.<sup>64</sup>

It is sometimes held that there can be no officer if the law attempting to create the office is void, since the idea of an officer implies the existence of an office which he holds. "It would be a misapplication of terms," says Mr. Justice Field, "to call one an officer who holds no office, and a public office can exist only by force of law." In denying that an unconstitutional legislative act can create an office so that the occupant thereof may be viewed as a *de facto* officer, he further says: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it has never been passed. \* \* \* For the existence of a *de facto* officer there must be an office *de jure*. \* \* \* Where no office legally exists, the pretended officer is merely an usurper to whose acts no validity can be attached."<sup>65</sup>

On the other hand, the rule has been declared that, although the law which purports to create an office is void, the incumbent may be a *de facto* officer until such law has been adjudged void by the judiciary.<sup>66</sup>

63. *People v. Teal*, 85 Cal. 333, 23 Pac. 203; *People v. Hecht*, 105 Cal. 621, 38 Pac. 941, 45 Am. St. Rep. 96, 27 L. R. A. 203; *Ex parte Snyder*, 64 Mo. 58, 62; *State v. O'Brian*, 68 Mo. 153, 154; *Decorah v. Bullis*, 25 Iowa 12; *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743.

64. *Wiesner v. Cent. Nat. Bank*, 106 Mo. App. 668, 80 S. W. 319.

65. *Norton v. Shelby County*, 118 U. S. 425, 441, 442, per Mr. Justice Field.

66. *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90, overruling *Flancher v. Camden*, 56 N. J. L. 244, 28 Atl. 82; *Burt v. Winona, etc. R. Co.*, 31 Minn. 472, 18 N. W. 285; *State v. Gardner*, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; *Heck v. Findley, etc. Co.*, 16 Ohio Cir. Ct. 111, 8 Ohio Cir. Dec. 757.

**De facto office and de facto officer distinguished.** "There is a radical and fundamental distinc-

### § 483. When officers holding over are *de facto* officers.

The acts of a board of equalization, upon which some of the members were holding over after the expiration of their terms, no other persons having been appointed to the positions, having been recognized by the tax payers as legal, are valid as the acts of a *de facto* board.<sup>67</sup> And where the office of mayor is abolished by statute and the office of recorder substituted in its place and the mayor holds over until the recorder assumes office, the mayor has power as a *de facto* officer to sign ordinances.<sup>68</sup> Likewise a regularly appointed water commissioner holding over after the expiration of his term is a *de facto* officer.<sup>69</sup> But a resolution, passed by a board of aldermen after the expiration of the terms of the members of such board fixed by charter, is not the act of a *de facto* board, and is invalid.<sup>70</sup>

### § 484. Acts of *de facto* officers are valid.

The acts of an officer *de facto*, although his title may be bad, are valid so far as they concern the public or third persons who have an interest in the thing done.<sup>71</sup>

tion between a *de facto* office and a *de facto* officer. The former cannot except in case of revolution, a complete overturning of constitutional authority, and the usurpation of all power of government by occupants exercising a force superior to the constitutional authorities." *Coquillard Wagon Works v. Melton*, 137 Ky. 189, 125 S. W. 291, 292.

67. *Nalle v. Austin*, 41 Tex. Civ. App. 423, 93 S. W. 141.

68. *Keeling v. Pittsburg*, 205 Pa. 31, 54 Atl. 485.

69. *Canaserago v. Green*, 88 N. Y. S. 539.

70. *Devlin v. White*, 27 R. I. 173, 61 A. 172.

71. *Alabama. Lockhart v. Troy*,

48 Ala. 579; *Butler v. Walker*, 98 Ala. 358, 39 Am. St. Rep. 61, 13 So. 261; *Ex parte Moore*, 62 Ala. 471.

*California. People v. Hecht*, 105 Cal. 621, 27 L. R. A. 203, 45 Am. St. Rep. 96, 38 Pac. 941.

*Connecticut. Trinity College v. Hartford*, 32 Conn. 452; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

*Georgia. Hawkins v. Jonesboro*, 63 Ga. 527.

*Indiana. State v. Fentress*, 37 Ind. App. 245, 76 N. E. 821.

*Iowa. Decorah v. Bullis*, 25 Iowa 12.

*Maryland. Koontz v. Hancock*, 64 Md. 134, 20 Atl. 1039.

*Mississippi. Greene v. Rienze*,

The official acts of *de facto* officers are validated only from motives of public policy to preserve the rights of third persons and the organization of society.<sup>72</sup> The rule as to the validation of the acts of *de facto* officers is one of policy, and has been applied in some cases, as mentioned above, not only where there is no *de jure* officer, but where the legal office itself no longer exists. Thus where the person claiming to hold the office is not a mere usurper, but, owing to a mistake of fact, held under a perfect color of right, which justified the conclusion that he was a legal officer holding a legal office, and where the fact that the office was abolished remained, for a long time, unknown, owing to a false announcement

87 Miss. 463, 40 So. 17, 112 Am. St. Rep. 449.

*Missouri.* Harbaugh v. Winsor, 38 Mo. 327; Fleming v. Mulhall, 9 Mo. App. 71; Powers v. Braley, 41 Mo. App. 556; State v. Douglas, 50 Mo. 593; State ex rel. v. Seay, 64 Mo. 89; State v. Dierberger, 90 Mo. 369, 2 S. W. 286; State ex rel. v. Badger, 90 Mo. App. 183; Akers v. Kolkmeier, 97 Mo. App. 520, 71 S. W. 536.

*Nebraska.* Holt County v. Scott, 53 Neb. 176, 73 N. W. 681; State v. Gray, 23 Neb. 365, 36 N. W. 577.

*New York.* People v. Stevens, 5 Hill. (N. Y.) 616; People v. Nostrand, 46 N. Y. 378; Williams v. Boynton, 147 N. Y. 426, 42 N. E. 184.

*North Carolina.* Trenton v. McDaniel, 52 N. C. 107.

*Ohio.* Kirker v. Cincinnati, 48 Ohio St. 507, 27 N. E. 898; Scovill v. Cleveland, 1 Ohio St. 126.

*Rhode Island.* Murphy v. Moies, 18 R. I. 100, 25 Atl. 977

*Tennessee.* Ensly v. Nashville, 61 Tenn. 144.

*Vermont.* School District v. Smith, 67 Vt. 566, 32 Atl. 484.

*Wisconsin.* Lover v. Glocklin, 28 Wis. 364.

**Councilmen and aldermen.**  
Acts of *de facto* councilmen valid. Roche v. Jones, 87 Va. 484, 12 S. E. 965; Dean v. Gleason, 16 Wis. 1.

Acts of *de facto* aldermen valid. Cochran v. McCleary, 22 Iowa 75; State v. Gray, 23 Neb. 365, 36 N. W. 577; People v. Highland Park, 88 Mich. 653, 50 N. W. 660.

The acts of trustees of a town acting and recognized as such are valid and binding as acts of officers *de facto*. Yancy v. Fairview, 23 Ky. L. Rep. 2087, 66 S. W. 636.

Law as to terms, tenure, etc., to be observed. Barrett v. New Orleans, 32 La. Ann. 101; Egan v. St. Paul, 57 Minn. 1, 58 N. W. 267.

72. Conway v. St. Louis, 9 Mo. App. 488; Scadding v. Lorant, 3 H. L. Cas. 418.

of election returns, his acts as such officer, done after the abolition of the office and before the fact became known, may be validated for the purpose of supporting contracts made with him where money and labor have been expended on the faith of his authority to act and contract as such officer.<sup>73</sup>

### § 485. Questioning title of *de facto* officer.

The title of one exercising municipal functions and who is acting as a *de facto* officer cannot be attacked collaterally, before the title to the office is determined.<sup>74</sup> Thus the rights of councilmen to act will not be collaterally determined in an action by tax payers to restrain the council from issuing bonds.<sup>75</sup>

However, if the question arises in which the cause of action or the defense rests upon rights relating to the

73. *Adams v. Lindell*, 72 Mo. 198, 5 Mo. App. 197; *State ex rel. v. Finn*, 4 Mo. App. 347; *State ex rel. v. Sutton*, 3 Mo. App. 388. See *McDowell v. United States*, 159 U. S. 596; *Nofire v. United States*, 164 U. S. 657.

"An officer *de facto* is distinguished from a mere usurper on the one hand, and from an officer *de jure* on the other. 'He is,' says Lord Raymond, 'one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.' *Parker v. Kett*, 1 Ld. Raym. 658. \* \* \* The essential thing seems to be that the unlawful officer whose acts are validated from public policy, should have exercised the duties of the office under such circumstances of reputation or acquiescence as were calculated to induce persons without inquiry to submit to, or invoke his action, supposing him in good faith to be

the officer he assumed to be." *Fleming v. Mulhall*, 9 Mo. App. 71. See *State ex rel. v. Sutton*, 3 Mo. App. 388.

74. *Alabama*. *Ex parte Moore*, 62 Ala. 471.

*Kentucky*. *Wagner v. Louisville* (Ky. 1909), 117 S. W. 283.

*Louisiana*. *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345.

*New Hampshire*. *Jewel v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 357.

*New York*. *People v. Trustees of Brooklyn Bridge*, 55 Hun (N. Y.) 606, 7 N. Y. S. 806; *People v. White*, 24 Wend. (N. Y.) 520.

*Texas*. *Stubbs v. Galveston*, 3 Willson Civ. Cas. Ct. of Apps. of Texas, § 143.

*Oregon*. *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176.

75. *Carlisle v. Saginaw*, 84 Mich. 134, 47 N. W. 444.

office, the issue of the right to the office is thus involved and may be considered. To illustrate, where the *de facto* officer seeks to recover the salary appertaining to the office.<sup>76</sup> So, if a police officer, in an action against him for assault and battery, seeks to justify by virtue of his office, he must establish that he is an officer *de jure*.<sup>77</sup>

## 7. TENURE OF OFFICERS, SUBORDINATES AND EMPLOYEES.

### § 486. Tenure of office of officer.

Officers and persons in public position hold, first, for a definite term; second, during good behavior; or, third, at the will or discretion of some officer or department.

As all offices and public positions are held subject to the will of the public it follows that all authorized repeals or amendment of the law creating them will abolish the offices or positions.<sup>78</sup>

A definite term is where the law so prescribes, which may be by authorized state statute,<sup>79</sup> or municipal charter,<sup>80</sup> or the organic law of the state.<sup>81</sup>

76. *Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736.

77. *Short v. Symes*, 150 Mass. 298, 15 Am. St. Rep. 204.

78. § 494 *post*.

79. *Collins v. Russell*, 107 Ga. 423, 33 S. E. 444; *Sherman v. Des Moines*, 100 Iowa 88, 69 N. W. 410; *Attorney General v. Shekell*, 138 Mich. 287, 101 N. W. 525; *Stanfield v. State*, 83 Tex. 317, 18 S. W. 577; *State v. McKone*, 95 Wis. 216, 70 N. W. 164.

80. St. Louis Charter, art. 4, §§ 1 and 2; Revised Code of St. Louis (1907, Woerner), pp. 344, 345, and notes.

81. Terms limited. No term of a municipal office shall exceed four

years. Const. Mo. 1875, art. IX, § 14.

The term of no office shall be extended for a longer period than that for which such officer was elected or appointed. Const. Mo. 1875, art. XIV.

"No term of office shall exceed four years." Const. Mo. 1875, art. IX, § 14.

See *State ex rel. v. Menaugh*, 151 Ind. 260, 51 N. E. 117, 43 L. R. A. 408, 418, construing a provision of the constitution of Indiana which inhibits the creation of an office the term of which shall be longer than four years, in which the question is elaborately discussed.

If not restricted by the Constitution it is undoubtedly the law as it has been declared that the state legislature

Constitutional provisions relating to the term of officers do not always apply to municipal officers. *Barton v. Kalloch*, 56 Cal. 95.

**Tenure under particular provisions.**

*California.* *Ruggles v. Woodland*, 88 Cal. 430, 26 Pac. 520.

*Colorado.* *People v. Herring*, 30 Colo. 445, 71 Pac. 413.

*Indiana.* *Kimberlin v. State*, 130 Ind. 120, 14 L. R. A. 858, 30 Am. St. Rep. 208, 29 N. E. 773.

*Kentucky.* *Lexington v. Wilson*, 97 Ky. 707, 31 S. W. 471, 17 Ky. Law Rep. 435; *McDermott v. Louisville*, 98 Ky. 50, 32 S. W. 264, 17 Ky. Law Rep. 617; *Jones v. Wilshire*, 98 Ky. 391, 33 S. W. 199; *Standeford v. Wingate*, 63 Ky. (2 Duv.) 440.

*New Jersey.* *State v. Gouldey*, 52 N. J. L. 62, 18 Atl. 695; *Vreeland v. Pierson*, 70 N. J. L. 508, 57 Atl. 151.

*New York.* *People v. Tremain*, 68 N. Y. 628; *Abrams v. Horton*, 18 N. Y. App. Div. 208, 45 N. Y. S. 887.

*Oklahoma.* *Territory v. Jacobs*, 12 Okla. 152, 70 Pac. 197; *Wright v. Jacobs*, 12 Okla. 138, 70 Pac. 193.

*Oregon.* *David v. Portland Water Co.*, 14 Or. 98, 12 Pac. 174.

*Pennsylvania.* *Appeal of Ayars*, 122 Pa. St. 266, 2 L. R. A. 577, 15 Atl. 356; *Commonwealth v. Wyman*, 137 Pa. St. 508, 21 Atl. 389.

*South Carolina.* *Alexander v. McKensie*, 2 S. C. 81.

*Texas.* *Stubbs v. Galveston*, 3 Willson Civ. Cas. Tex. Ct. of App.,

§ 143; *State v. Catlin*, 84 Tex. 48, 19 S. W. 302.

*Utah.* *State v. Beardsley*, 13 Utah 502, 45 Pac. 569.

*Virginia.* *Haynes v. Commonwealth*, 31 Grat. (Va.) 96; *Branham v. Long*, 78 Va. 352.

Term of office, vacancies and holding over. *People v. Wright*, 30 Colo. 439, 71 Pac. 365.

**Tenure in particular instances.**

A superintendent of buildings appointed for a fixed term by the council under the statutes, can not be removed at will by a succeeding council during such term. *Peal v. Newark*, 66 N. J. L. 265, 49 Atl. 468, affirming 66 N. J. L. 109, 48 Atl. 576, reversing 48 Atl. 578.

And the attempt of the council to fix terms for the assistants of such officer, who hold simply under the city charter as subordinate officers, is void as against a succeeding council. *Peal v. Newark*, 66 N. J. L. 265, 49 Atl. 468; *O'Rourke v. Newark*, 66 N. J. L. 265, 49 Atl. 468, affirming 48 Atl. 576, reversing 48 Atl. 578.

Under charter providing that the mayor shall hold office for two years commencing at noon on the first day of January after his election, and the constitution providing that the terms of office of city officers shall expire at the end of odd numbered years, the term of a mayor expiring in 1903 expired at midnight, December, 1903, and not at noon, January 1, 1904. *People v. Fitzgerald*, 89 N. Y. S. 268, 96 App. Div. 242, af-

may shorten the term of office,<sup>82</sup> or extend it.<sup>83</sup> However, where the State Constitution forbids legislative control of municipal offices and officers (which is the general rule, as mentioned elsewhere),<sup>84</sup> a legislative act that contemplates extending the term of an officer is void.<sup>85</sup>

Sometimes the terms of officers may be fixed by ordinance, but it is clear that an ordinance cannot vary the provisions of the charter, or any valid state law, respecting the tenure of office.<sup>86</sup> Thus where by valid legislative act or charter an officer holds at the pleasure of the appointing power, an ordinance cannot vary the tenure.<sup>87</sup>

firming in 180 N. Y. 269, 73 N. E. 55, 34 Civ. Proc. R. 56.

A requirement that particular officers should be appointed biennially means that appointments should be made once in two years but does not fix the term at two years. *People v. Kilbourn*, 68 N. Y. 479.

Term was four years; officer appointed without specifying term, held, four years. *State ex rel. v. St. Louis Pol. Comrs.*, 88 Mo. 144, 14 Mo. App. 297.

Under a charter providing that officers who are elected shall serve two years, one holding his office by the votes of the council, held to be elected. *State v. Squire*, 39 Ohio St. 197.

82. *Long v. New York*, 81 N. Y. 425.

§ 491 *post*.

83. § 491 *post*.

84. § 176 *et seq. ante*.

85. *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831.

86. *Stragler v. Detroit*, 13 Mich. 646; *East St. Louis v. Kase*, 9 Ill.

App. 409; *Jacksonville v. Allen*, 25 Ill. App. 54; *State v. Lane*, 53 N. J. L. 275, 21 Atl. 302.

Fixing term by ordinance. If the term is limited to four years, an ordinance cannot extend the term. *People ex rel. v. Perry*, 79 Cal. 105, 27 Pac. 423, cited with approval in *State ex rel. v. Johnson*, 123 Mo. 43, 51, 27 S. W. 399, 401.

This provision does not apply to an office the term of which continues during the pleasure of the appointing power. It only embraces officers who are elected or appointed for some specific or definite time. *State ex rel. v. Johnson*, 123 Mo. 43, 49, 27 S. W. 399.

See *State ex rel. v. Police Commissioners*, 14 Mo. App. 297.

87. *Uffert v. Vogt*, 65 N. J. L. 621, 48 Atl. 574, affirming 65 N. J. L. 377, 47 Atl. 225.

Ordinance cannot fix, if held at pleasure. Under a statute providing for the appointment of a health officer by a board and permitting removal of such officer by the board at any time, an ordi-

### § 487. Same—holding over—no successor.

Failure to appoint or elect a successor at the end of a defined period does not usually work a vacancy where the officer is to hold until his successor is elected or appointed and qualified.<sup>88</sup> Therefore, the time an officer holds over the designated period is as much his term of

nance fixing the term of such officer at two years, held *ultra vires*. *Riffe v. Tinsley*, 20 Ky. Law Rep. 281, 45 S. W. 1046.

88. *State ex rel. v. Lusk*, 18 Mo. 333; *State ex rel. v. Thompson*, 38 Mo. 192; *State ex rel. v. Ransom*, 73 Mo. 78, 94; *Savings Bank v. Hunt*, 72 Mo. 597; *Long v. Seay*, 72 Mo. 648; *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203.

**No election of successor.** Under laws providing for the annual election of councilmen and declaring that the officers elected shall serve until others are duly elected and qualified, a councilman who is a candidate for re-election and receives the same number of votes as his opponent continues to hold as a *de jure* officer until a successor shall be duly elected and qualified. *Com. v. O'Neal*, 203 Pa. 132, 52 Atl. 134.

Where one is holding an office for a specified period "and until his successor is elected and qualified," he will retain the office after the lapse of the specified period when the one elected to succeed him is ineligible. *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, 22 Am. St. Rep. 709.

**What is vacancy where officer**

**holds till successor is elected or appointed and qualified.** *State v. Davis*, 45 N. J. L. 390.

Under a statute requiring municipal officers to hold office for a stated term and until their successors are duly elected and qualified, the election of a person not qualified has the same effect as no election, and, hence, there is no vacancy within a statute providing that failure of an officer elect to qualify shall cause a vacancy. *State v. Hays*, 91 Miss. 755, 45 So. 728.

An office held by a person until his successor is elected and qualified is not rendered vacant by the failure of one elected to such office to qualify. *State v. Rosewater*, 79 Neb. 450, 113 N. W. 206.

In such case the incumbent may qualify anew under Nebraska laws. *State v. Rosewater*, 79 Neb. 450, 113 N. W. 206.

Under a statute providing that an officer shall hold over until his successor shall be chosen and qualified, but after the expiration of his term the office shall be deemed vacant for the purpose of choosing his successor, a failure to elect such officer at an annual election necessitates the calling of a special election. *In re Travis*, 84 N. Y. S. 534, 87 App. Div. 554.



office as that which precedes the date at which the new election or appointment should be held or made.<sup>89</sup>

Declining to adhere to the strict ancient English rule that, without express clause in the charter the mayor or other chief officer could not hold over until his successor was appointed,<sup>90</sup> the American courts early adopted the doctrine that, in the absence of express provision and unless the legislative intent to the contrary is manifest, municipal officers hold over until their successors are provided.<sup>91</sup> This doctrine has often been promulgated by

89. *State ex rel. v. Smith*, 87 Mo. 158, 2 Western Rep. 477; *State v. Saxon*, 25 Fla. 792; *State ex rel. v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321.

90. *Glover, Mun. Corp.*, § 173; *Rex v. Atkyns*, 4 Mod. 12.

91. *Alabama*. *Montgomery v. Hughes*, 65 Ala. 201.

*California*. *Ruggles v. Woodland*, 88 Cal. 430, 26 Pac. 520; *People v. Murray*, 15 Cal. 221; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

*Colorado*. *Central v. Sears*, 2 Colo. 588.

*Connecticut*. *State v. Bulkeley*, 61 Conn. 287, 14 L. R. A. 657, 23 Atl. 186; *State v. Fagin*, 42 Conn. 32; *Congregational Society v. Sperry*, 10 Conn. 200, 207; *Spencer v. Champion*, 9 Conn. 537; *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

*Georgia*. *Lambert v. Norman*, 119 Ga. 351, 46 S. E. 433.

*Illinois*. *People v. Fairbury*, 51 Ill. 149; *People v. Elair*, 82 Ill. App. 570.

*Indiana*. *Kimberlain v. State*, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

*Kentucky*. *Johnson v. Wilson*, 95 Ky. 415, 15 Ky. Law Rep. 852, 25 S. W. 1057; *Shelley v. McCullough*, 97 Ky. 164, 30 S. W. 193; *Bybee v. Smith*, 22 Ky. Law Rep. 467, 57 S. W. 789.

*Maine*. *Rounds v. Smart*, 71 Me. 380.

*Maryland*. *Thomas v. Owens*, 4 Md. 221; *Sappington v. Scott*, 14 Md. 40.

*Massachusetts*. *Overseers of the Poor v. Sears*, 22 Pick. (Mass.) 122, 130.

*Missouri*. *State v. Perkins*, 139 Mo. 106, 40 S. W. 650.

*Nebraska*. *Hotchkiss v. Keck*, 86 Neb. 322, 125 N. W. 509, reversing 84 Neb. 545, 121 N. W. 579; *McMillin v. Richards*, 45 Neb. 786, 64 N. W. 242.

*New York*. *Elmendorf v. Mayor*, 25 Wend. (N. Y.) 693; *People v. North*, 72 N. Y. 124; *Badger v. Tieman*, 8 Abb. Pr. (N. Y.) 359, 30 Barb. (N. Y.) 193; *People v. Ferris*, 16 Hun 219, affirmed in 76 N. Y. 326; *White v. New York*, 4 E. D. Smith (N. Y.) 563; *De Lacey v. Brooklyn*, 12 N. Y. S. 540; *People v. Barrett*, 8 N. Y. Supp. 677.

precise provisions in municipal charters and has been incorporated in state systems by constitution and statute.<sup>92</sup> It finds its fundamental basis in consideration of public convenience and necessity,<sup>93</sup> is broad enough to cover subordinate, and has been thus comprehensively

*Ohio.* State v. Kearns, 47 Ohio St. 566, 25 N. E. 1027.

*Oklahoma.* Wright v. Jacobs, 12 Okla. 138, 70 Pac. 193; Territory v. Jacobs, 12 Okla. 152, 70 Pac. 197.

*Pennsylvania.* Com. v. O'Neal, 203 Pa. 132, 52 Atl. 134.

*Rhode Island.* In re Budlong, 15 R. I. 322, 5 Atl. 77.

*Tennessee.* State v. Wilson, 12 Lea (Tenn.) 246; Lynch v. Laf-land, 4 Coldw. (Tenn.) 96.

*Texas.* Keen v. Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983.

*Utah.* State v. Beardsley, 13 Utah 502, 45 Pac. 569; Pratt v. Swan, 16 Utah 483, 52 Pac. 1092.

*Vermont.* Chandler v. Bradish, 23 Vt. 416.

*Virginia.* Kirkham v. Russell, 76 Va. 956, 958; In re Richmond Mayoralty Case, 19 Gratt. (Va.) 673.

*West Virginia.* Wheeling v. Black, 25 W. Va. 266.

Kent, Com. 238; Mechem, Pub. Off., § 397; Throop, Pub. Off., §§ 323, 325.

**De Facto**, if holds over after term expires, acts of cannot be attacked collaterally. State v. Smith, 87 Mo. 158; People v. Carter, 65 Md. 321, 4 Atl. 282; Wier v. Bush, 4 Litt. (Ky.) 430; McCall v. Byram Mfg. Co., 6 Conn. 428; Tuley v. State, 1 Ind. 500; Barth v. Reed, 78 Me. 276, 4 Atl. 688; Peo-

ple v. Oulton, 28 Cal. 44; Wheeling v. Black, 25 W. Va. 266.

When legislative intent is to the contrary. McDermott v. Louisville, 98 Ky. Law Rep. 617, 32 S. W. 264; Louisville v. Higdon, 2 Metc. (Ky.) 526; State v. Lund, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572; Long v. New York, 81 N. Y. 425; People v. Tieman, 30 Barb. (N. Y.) 193.

Construction of particular provision where officer was selected to succeed himself. Grand Haven v. U. S. Fidelity Co., 128 Mich. 106, 87 N. W. 104.

92. *Missouri.* Const. Mo. 1875, art. XIV, § 5; R. S. 1909, § 10197; State ex rel. v. Perkins, 139 Mo. 106, 40 S. W. 650; State ex rel. v. Stonestreet, 99 Mo. 361, 376, 12 S. W. 895; Hunt v. Sanders, 30 R. I. 480, 76 Atl. 179.

*Colorado.* The constitution of Colorado so provides as to all civil officers of cities. London v. People, 15 Colo. 557, 26 Pac. 136; People v. Herring, 30 Colo. 445, 71 Pac. 413.

*Georgia.* Lamb v. Dunwoody, 94 Ga. 58, 20 S. E. 637.

*Indiana.* State v. Husband, 26 Ind. 308.

*Maine.* Bath v. Reed, 78 Me. 276, 4 Atl. 688; Rounds v. Smart, 71 Me. 380.

93. Stratton v. Oulton, 28 Cal. 44.

stated by the Court of Appeals of Maryland: "Unless there is some clearly expressed and positive prohibition, which, by its terms, operates as an ouster, the person filling the office should continue to discharge those duties until a successor is qualified, no matter whether the office is created by the constitution, by an act of the general assembly, or by municipal ordinance. *Ubi eadem est ratio, eadem est lex.*"<sup>94</sup>

Various applications of the doctrine in construing laws relating thereto appear from the numerous judicial decisions in the note.<sup>95</sup>

94. *Robb v. Carter*, 65 Md. 321, 335, 4 Atl. 282.

95. *Holding over*, *State v. Bailey*, 37 Ohio St. 98; *State v. Davies*, 30 Ohio Cir. Ct. 270.

One removed cannot hold over. *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228.

Failure to appoint at expiration of term, will not give right to hold over, when. *Saunders v. Grand Rapids*, 46 Mich. 467, 9 N. W. 495.

In absence of provision to that effect, an officer does not hold till successor is appointed and qualified. *Beck v. Hanscom*, 29 N. H. 213.

When the successor is elected and qualified the authority of an incumbent as an official ceased. *Vaughn v. Johnson*, 77 Va. 300.

Where successor who has been duly elected forfeits office by failure to qualify the incumbent holds over until a successor is duly elected and qualified. *Johnson v. Mann*, 77 Va. 265.

When a bond is required to be filed and approved the incumbent holds and draws the salary after the expiration of his term until such bond is filed and approved.

*De Lacey v. Brooklyn*, 12 N. Y. S. 540.

Where the council has power to declare and determine what persons have been elected as councilmen, the members of the council continue in office until they have certified those elected as their successors. *People v. North*, 72 N. Y. 124.

Notwithstanding an election is illegal the incumbents hold until successors are legally elected and qualified. *In re Budlong*, 15 R. I. 332, 5 Atl. 77.

Failure to elect on the date appointed enables incumbents to hold until successors are elected and qualified. *Lynch v. Lafland*, 44 Tenn. (4 Coldw.) 96; *State v. Wilson*, 80 (12 Lea) Tenn. 246.

The time between the election of a city treasurer to succeed himself and the time he qualifies is a part of the preceding term under a statute providing that city treasurers shall hold office for one year and until their successors are qualified. *Grand Haven v. U. S. Fidelity and Guaranty Co.*, 128 Mich. 106, 8 Det. Leg. N. 546, 87 N. W. 104.

Constitutional provisions sometimes forbid the extension of terms of public officers. Under such provision a legislative act providing that upon its adoption by a city the officers then in office shall serve until their successors are elected and qualified is valid.<sup>96</sup>

Where a village clerk acted as secretary of the water board under a resolution of the council, though without a formal and regular appointment, such resolution and a custom requiring the village clerk to act as such secretary did not merge the two offices into one so as to terminate both terms contemporaneously. *Laurium v. Mills*, 129 Mich. 536, 8 Det. L. N. 1083, 89 N. W. 362.

Under a constitutional provision that a public officer shall hold his office for a term therein fixed and until his successor is elected and qualified, the legislature cannot arbitrarily delay the election of such successors so as to permit the previous incumbent to hold beyond the limit of his term. *Gemmer v. State ex rel. Stephens*, 163 Ind. 150, 71 N. E. 478, 66 L. R. A. 82.

Under a statute providing that councilmen shall hold office for a term of three years and until their successors shall have qualified by filing an official oath, where two councilmen have been elected to succeed two others whose terms expire simultaneously the filing of the oath by one of the new councilmen terminates the office of both the old members. *State ex rel. Whitehead v. Armstrong*, 67 N. J. L. 405, 51 Atl. 472; *Kilburn v. Conlan*, 56 N. J. L. 349, 29 Atl. 162.

When local corporation ceases to exist, of course the officer does

not hold over. *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993.

96. *Crook v. People*, 106 Ill. 237.

**Holding over** — **illustrative cases.** Where charter provides that officers shall hold office until their successors are elected and qualified, and where proceedings have been properly brought to contest an election for a municipal office, in the absence of any certificate of election the old incumbent is entitled to hold over until such certificate has been issued or the contest decided. *Scales v. Faulkner*, 118 Ga. 152, 44 S. E. 987; *Walker v. Quillian*, 118 Ga. 152, 44 S. E. 987.

A general election is not a municipal election within the meaning of a charter providing that certain appointees of the mayor shall hold office until a certain day after "the next municipal election." *People v. Scheu*, 167 N. Y. 292, 60 N. E. 650, affirming 69 N. Y. S. 597.

Charter provided term for two years and fixed time when appointments should be made. State Constitution read: "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation shall hold office during their official term, or until their successors shall be duly elected or appointed and qualified." Held, charter "contrary provisions," and right to hold cease at expiration

An officer appointed or elected to fill a vacancy holds until the expiration of the term,<sup>97</sup> or, unless otherwise provided by law, until the office is filled as the law prescribes,<sup>98</sup> or until his successor is appointed or elected and qualified.<sup>99</sup>

§ 488. Same—during good behavior.

A provision in the charter that the appointees of a certain department shall hold office during good behavior

of two years though no successor appointed. Constitution applied to municipal officers. *State v. Lund*, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572.

Where an appointed officer is permitted to hold until his successor is appointed and qualified his office does not expire until his successor is appointed and confirmed where so required. *White v. New York*, 4 E. D. Smith (N. Y.) 563.

The term of one holding over is terminated by the election of another to the office. *Pevey v. Aylward*, 205 Mass. 102, 91 N. E. 315.

Sometimes the term expires immediately upon the expiration of the term which is definite and the officer cannot hold over until his successor is selected. *People v. Tiemen*, 30 Barb. (N. Y.) 193.

Under a charter providing that councilmen shall be chosen for one year and "no longer," held, all acts of councilmen after such time are void. *Louisville v. Higdon*, 56 Ky. (2 Metc.) 526.

Where the law requires the trustees to notify an election for their successors, they will be ousted if they have neglected to do this, although under the law they may hold until others are

elected in their place. *People v. Barlett*, 6 Wend. (N. Y.) 422.

**Legislative body.** The term of a legislative body which expires by law at a certain hour cannot be extended beyond that hour, though members of the body hold until their successors are severally qualified. *Devlin v. White*, 27 R. I. 173, 61 Atl. 172; *Fitzgerald v. Pawtucket St. Ry.*, 24 R. I. 201, 52 Atl. 887.

97. *State v. Phillips*, 30 Fla. 579, 11 So. 922; *State v. La Porte*, 28 Ind. 248; *Carson v. State*, 145 Ind. 348, 44 N. E. 360; *State v. Hadley*, 7 Wis. 700.

**Death after re-election—appointment.** Where the death of an officer occurred before the expiration of his first term but after his re-election to the same office, the appointment of one to serve out "the balance of the unexpired term," was for the balance of the first term only, and not for the term for which the former officer had been re-elected. *People v. Stockwell*, 66 N. Y. Misc. 2, 121 N. Y. S. 6.

98. *Tillson v. Ford*, 53 Cal. 701.

99. *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *State v. Elliott*, 13 Utah 471, 45 Pac. 346.

was construed to mean that such appointees shall hold office during good behavior not to exceed the limits fixed by the constitution.<sup>1</sup> So a law providing that persons holding office or employment in the classified civil service shall not be removed without cause, etc., was held not to extend the term of such officer appointed for a time fixed by charter.<sup>2</sup>

Under a charter providing for the annual election of certain officers to hold for the ensuing year, and until others were elected and qualified, an ordinance providing that such officers shall hold office during good behavior is void.<sup>3</sup>

**§ 489. Same—tenure at will of authority which confers office.**

If no definite term exists, and the law does not otherwise provide, the tenure is at the will of the authority which confers the office.<sup>4</sup>

1. *Callaghan v. McGown*, Tex. Civ. App. (1905), 90 S. W. 319; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328; *Callaghan v. Irvin*, 40 Tex. Civ. App. 403, 90 S. W. 335.

2. *Smith v. Mayor of Haverhill et al.*, 187 Mass. 323, 72 N. E. 988.

During good behavior. *Proctor v. Blackburn* (Tex. Civ. App. 1902), 67 S. W. 548.

The term of a police officer fixed by ordinance, is not enlarged by a subsequent statute prohibiting the removal of such officers except for cause. *Lahar v. Eldridge*, 190 Mass. 504, 77 N. E. 635.

May fix term during good behavior. *State v. Trenton*, 50 N. J. L. 331, 13 Atl. 228.

A provision of a city charter that police shall hold office during good behavior is unconstitutional.

*Houston v. Mahoney*, 36 Tex. Civ. App. 45, 80 S. W. 1142.

See *People v. Partridge*, 78 N. Y. S. 249, 38 Misc. Rep. 697.

A police commission required by law to keep the expenses of the police department within the revenues appropriated for that purpose has the power to remove officers to reduce the force to keep expenses within the estimated revenues, though statutes provide that policemen shall hold during good behavior. *Venable v. Board of Police Commissioners*, 40 Ore. 458, 67 Pac. 203.

3. *Stuart v. Ellsworth*, 105 Me. 523, 75 Atl. 59.

4. *State ex rel. v. Alt*, 26 Mo. App. 673; *Mack v. New York*, 75 N. Y. S. 809, 37 Misc. Rep. 371; *People v. Drake*, 43 N. Y. 60 N. Y. S. 309, App. Div. 325;

The term of an officer appointed for no definite time expires when his successor is appointed and enters upon the duties of his office, under a law authorizing officers to hold their offices until their successors are chosen and qualified.<sup>5</sup>

**§ 490. Same—change of class or grade, or, of municipal organization.**

Change in the municipal organization by charter amendment or consolidation, or in class or grade in the absence of legal provision to that effect, will not, ordinarily, result in a vacation of the officers.<sup>6</sup> However, in

*People v. Robb*, 126 N. Y. 182, 27 N. E. 267; *People v. Lathrop*, 142 N. Y. 113, 36 N. E. 805; *People v. Keller*, 159 N. Y. 187, 52 N. E. 110; *People v. Whitlock*, 92 N. Y. 191; *In re Hennan*, 13 Pet. (U. S.) 235, 239.

*In England*. 45 & 46 Vict. C. 50, § 19.

**Civil service.** A police officer originally appointed under civil service rules, who served continuously for several years by annual re-appointment either as policeman or city marshal, though he received no wages as policeman, retained his eligibility to the position of police officer from year to year. *Lattime v. Hunt*, 196 Mass. 261, 81 N. E. 1001.

5. *Oklahoma City v. Dean*, 15 Okla. 139, 79 Pac. 755.

6. *State v. Wyman*, 97 Iowa 570, 66 N. W. 786; *State v. White*, 20 Neb. 37, 28 N. W. 846; *Hutchinson v. Belmar*, 62 N. J. L. 450, 45 Atl. 1092, affirming 61 N. J. L. 443, 39 Atl. 643; *In re Assessments for Construction of Sewer in Passaic*, 54 N. J. L. 156, 23 Atl.

517; *Com. v. Davis*, 9 Pa. Dist. 222, 22 Pa. Co. Ct. 533; *Com. v. Hillman*, 9 Kulp (Pa.) 359.

See, *Bullis v. Chicago*, 235 Ill. 472, 85 N. E. 614, reversing 138 Ill. App. 297.

Charter amendment relating to term, does not affect officer in office, without provision to such effect. *Greer v. Asheville*, 114 N. C. 678, 19 S. E. 635.

Under the charter of Greater New York continuing in office all superintendents, assistant or associate superintendents and all principals "and other members of the educational staff" in the public school system, an attendance officer appointed prior to the taking effect of the charter, was not continued in office after that time. *People v. White*, 72 N. Y. S. 91, 64 App. Div. 390.

A statute fixing the terms of certain officers at three years, and repealing all inconsistent legislation modifies a town charter under which officers hold only during the pleasure of the council. *Vreeland v. Pierson*, 70 N. J. L. 503, 57

some cases, reorganization will work a change in official terms.<sup>7</sup> But to prevent confusion laws sometimes make provision for the old officers to hold office until their successors are duly qualified.<sup>8</sup>

### § 491. Same—changes in term.

All changes in terms of offices, whether by extension or limitation, to be valid, must be authorized, and made in the manner provided.<sup>9</sup> Unless restricted by the organic

Atl. 151; *Tillyer v. Minderman*, 70 N. J. L. 512, 57 Atl. 329.

Police commissioners, change of laws. *People v. Hammond*, 66 Cal. 654, 6 Pac. 741; *State v. Pinkerman*, 63 Conn. 176, 22 L. R. A. 653, 28 Atl. 110; *State v. Simon*, 20 Or. 365, 26 Pac. 170; *People v. McClane*, 99 N. Y. 83, 1 N. E. 235.

**Change of grade or class.** Under the statutes of Kentucky the officers of a city coming from the third class into the second class are entitled to hold their offices and receive the same compensation as before the transfer, until the election of their successors at the next regular election for cities of the second class. *Gilbert v. Paducah*, 24 Ky. L. R. 1998, 72 S. W. 816; *Crow v. Paducah*, 24 Ky. L. R. 1998, 72 S. W. 816.

Under the constitution of Oklahoma, those who were officers of municipal corporations in the Indian Territory at the time of the admission of the state continued to be such after the admission. *State v. Bridges*, Okl. (1908), 94 Pac. 1065.

And such officers hold their respective offices and discharge the duties thereof by virtue of the constitution, and not by virtue of any

election or appointment under laws of the Indian Territory prior to the admission of the state. *State v. Bridges*, Okl. (1908), 94 Pac. 1065.

7. *People v. Feitner*, 156 N. Y. 694, 51 N. E. 1093, affirming 30 N. Y. App. Div. 241, 51 N. Y. S. 1094.

8. *Ayar's Appeal*, 122 Pa. St. 266, 2 L. R. A. 577, 16 Atl. 356; *Com. v. Ricketts*, 196 Pa. St. 598, 46 Atl. 900; *People v. Van Wart*, 25 Misc. (N. Y.) 215, 55 N. Y. S. 68, affirming in 36 N. Y. App. Div. 518, 55 N. Y. S. 522.

9. **Extension of term.** *State v. Wilson*, 142 Ind. 102, 41 N. E. 361; *Erb v. Commonwealth*, 91 Pa. St. 212; *Clark v. Rogers*, 4 Ky. Law Rep. 929.

When law relating to extension of term is prospective only and not relating to present incumbent. *Bird v. Johnson*, 59 N. J. L. 59, 34 Atl. 929; *Huhlman v. Smeltz*, 171 Pa. St. 440, 33 Atl. 358.

A statute providing that a person holding an office in the classified civil service shall not be removed therefrom without his consent except for cause, does not enlarge the term of a police officer prescribed by laws in existence



law of the state, terms of office may be lengthened or shortened by statute if the legislature has jurisdiction; or, if the power is vested in the municipal corporation

at the time of the passage of such statute. *Lahar v. Eldridge*, 190 Mass. 504, 77 N. E. 635.

The office of judge of the city court of Kansas City, Kansas, is neither a county nor township office and the term of the incumbent thereof is not extended by virtue of constitutional amendment extending the terms of such offices. *Griffith v. Manning*, 67 Kan. 559, 73 Pac. 75.

Under a statute providing that aldermen whose terms shall not expire until the year 1902 shall hold over their terms until a certain day after the election of April, 1902, at which time their terms shall expire, the terms of office of such aldermen were not extended beyond such day, though no election was held in April, 1902. *People v. Wright*, 30 Colo. 439, 71 Pac. 365.

A statute devising a scheme of government for a city is not unconstitutional because it prolongs the term of the city executive appointed by the governor to a day beyond an election, thereby depriving the citizens of the right of election. *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801, 46 Pittsburg Leg. J. 385.

A statute extending the terms of councilmen upon the consolidation of city with another is not in violation of a constitutional pro-

vision that "no law shall extend the term of any public officer." *In re Pittsburg*, 217 Pa. 227, 66 Atl. 348; *Appeal of Hunter*, 217 Pa. 227, 66 Atl. 348, affirmed in *Hunter v. Pittsburg*, 28 Sup. Ct. 40, 207 U. S. 161.

An act of the legislature in purporting to extend the terms of city magistrates by an amendment to the charter is in effect an appointment by the legislature and violates the constitutional provision that existing city officers shall be elected by the electors of the city or appointed by such authorities thereof as the legislature may designate. *Kelly v. Van Wyck*, 71 N. Y. S. 814, 35 Misc. R. 210.

**Shortening term.** "The power lodged in the board of aldermen by the statute to determine the election and qualifications of its members, does not authorize them to take from a member, without right, an office into which he has already been inducted under a previous board, and to which he has a vested right." *Hobbs v. Upington*, 28 Ky. L. R. 131, 132, 89 S. W. 128, 129.

**Long and short terms.** Where several long terms and one short term on the board of aldermen were to be filled at an election, and it did not appear, after the election, which was elected for the long terms and which for the short term, none of the members

unless forbidden by the charter, such change may be made by appropriate ordinance.<sup>10</sup>

In accordance with the principle stated no statute of course can make a valid change contrary to the state constitution.<sup>11</sup> Nor is a municipal ordinance legal which seeks to vary the term of an office fixed by state statute or municipal charter.<sup>12</sup> Nor can the officer or body authorized to appoint or elect, vary the term prescribed by law.<sup>13</sup>

so elected was entitled to a vote to determine which of them was to take the short term under a charter declaring that such board should determine the election and qualification of its members. *Hobbs v. Uppington*, 28 Ky. L. R. 131, 89 S. W. 128.

Where five members of the board of aldermen were elected to four long terms and one short term, and it was not indicated which of them was to fill the short term, the proper way to settle the dispute was to cast lots. *Hobbs v. Uppington*, 28 Ky. L. R. 131, 89 S. W. 128.

A member of the board of aldermen, who, in order to settle a dispute as to which of prior members elected, of which he was one, was to take a short term, agreed, that if he was elected president of the board he would accept the short term, he was thereby estopped after the expiration of the short term, from claiming a long one. *Hobbs v. Uppington*, 28 Ky. L. R. 131, 132, 89 S. W. 128, 129.

10. *Alabama*. *Beebe v. Robinson*, 64 Ala. 171.

*Indiana*. *State v. Menaugh*, 151 Ind. 260, 43 L. R. A. 408, 51 N. E. 117; *State v. Wilson*, 142 Ind. 102, 41 N. E. 361.

*New York*. *People v. Kent*, 83 N. Y. App. Div. 554, 82 N. Y. S. 172.

*Ohio*. *State v. Witt*, 72 Ohio St. 584, 74 N. E. 1075.

*Pennsylvania*. *Kuhlman v. Smeltz*, 171 Pa. St. 440, 33 Atl. 358; *Com. v. Nichols*, 10 Kulp (Pa.) 193; *Erb v. Com.*, 91 Pa. St. 212.

*South Carolina*. *Alexander v. McKenzie*, 2 Rich. (S. C.) 81.

11. *Clark v. Rogers*, 4 Ky. Law Rep. 929; *State v. Catlin*, 84 Tex. 48, 19 S. W. 302; *O'Connor v. Fond du Lac*, 109 Wis. 253, 53 L. R. A. 831, 85 N. W. 327.

12. *State v. Dillon*, 42 Fla. 95, 28 So. 781; *East St. Louis v. Kase*, 9 Ill. App. 409; *Uffert v. Vogt*, 65 N. J. L. 621, 48 Atl. 574.

13. *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *Stewart v. Hudson County*, 61 N. J. L. 117, 38 Atl. 842; *State v. Brady*, 42 Ohio St. 504.

## § 492. Tenure of assistants, etc.

It is a well-established rule of law that the power to appoint to an office or position, where the term or tenure is not defined, carries with it the power of removal.<sup>14</sup> The Supreme Court of the United States in an early case, which has always been followed, said: "All offices, the tenure of which is not fixed by the constitution or limited by law, must be held (1) either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or (2) must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the constitution, that these offices which are denominated inferior offices, should be held during life. And if removable, by whom is such removal to be made? In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment."<sup>15</sup> It is also a maxim of the law that where the

14. *People ex rel. v. Brooklyn*, 149 N. Y. 215, 43 N. E. 554; *People ex rel. v. Robb*, 126 N. Y. 180, 27 N. E. 267; *People ex rel. v. Fire Comrs.*, 73 N. Y. 437; *Newsum v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *People v. Higgins*, 15 Ill. 110; *Keenan v. Perry*, 24 Tex. 259; *People v. Stout*, 19 How U. S. 171.

15. *Ex parte Hennan*, 13 Peters (38 U. S.) 230, 259, 10 L. Ed. 138, followed in *In re Eaves*, 30 Fed. 21, 23; *In re Commissioners of Circuit Court*, 65 Fed. 314, 318; *see Todd v. U. S.*, 158 U. S. 278, 7 Sup. Ct. 889, 39 L. Ed. 982; *U. S. v. Allred*, 155 U. S. 591, 594, 15 Sup. Ct. 231, 39 L. Ed. 273; *Parsons v. U. S.*, 167 U. S. 324, 331, 17 Sup. Ct. 880, 42 L. Ed. 185; *U. S.*

*v. Perkins*, 116 U. S. 483, 16 Sup. Ct. 1073, 41 L. Ed. 287, affirming 20 Ct. of Cl. 438; *Blake v. U. S.*, 103 U. S. 227, 231, 26 L. Ed. 462; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

**Tenure is at will of officer.** In a Louisiana case the appointment of an assistant was made by the city engineer and confirmed by the council. Here it was held that the city engineer could discharge the assistant at pleasure, without assigning a cause, there being no express provision in the charter or ordinances to the contrary. In denying the contention that the power of removal belonged to the mayor, the court said that it was not the intention "that the mayor should concern himself about what

time of holding is not fixed, the tenure of the office or position is at the pleasure of the appointing power,<sup>16</sup> and it follows that authority of removal may be exercised at any time;<sup>17</sup> and such power cannot be divested or taken away, except by limiting the term;<sup>18</sup> but the authority to do this must be expressly conferred by charter or statute applicable.

In view of the rules just stated, the fact that the assistant or subordinate may be technically an officer, as defined by charter, does not strengthen his tenure, provided the power of removal is conferred by charter. Charter power of removal "at pleasure" cannot be limited by ordinance to "removal for cause."<sup>19</sup>

Nor will the fact that the assistant may have an annual salary create a yearly tenure, or indeed any tenure beyond

each deputy or assistant ought to do in his subordinate capacity in any of the departments. This \* \* \* was left to the chief of each department to exercise properly, both as relates to his department and to those placed in his charge." *Peters v. Bell*, 51 La. Ann. 1621, 26 So. 442.

A charter which provides that the mayor and aldermen shall have exclusive power to appoint police officers, "the same to remove at pleasure," and that the mayor may, if in his opinion the public good requires, "remove, with the consent of the appointing power, any officer" appointed on his nomination, authorizes the mayor with such consent to remove police officers, including the appointees of a predecessor, without a hearing or cause shown. *Williams v. Gloucester*, 148 Mass. 256, 259, 19 N. E. 348.

16. § 489 *ante*.

17. *Collins v. Tracy*, 36 Tex. 546,

18. *People v. Hill*, 7 Cal. 97, 102, affirmed in *Smith v. Brown*, 59 Cal. 672.

19. Ordinance cannot change charter. An ordinance providing that the appointment of a city officer shall continue until removed "for cause" is of no effect, where the city charter (*St. Joseph*) authorizes the appointment by the council during "its pleasure." *State ex rel. v. Johnson*, 123 Mo. 43, 50, 27 S. W. 399. To same effect, *Horan v. Lane*, 53 N. J. L. 274, 21 Atl. 302.

See *State v. Draper*, 50 Mo. 353.

The proposition is self-evident that an ordinance can no more change or limit the effect of a charter provision than a legislative act can modify or supersede a provision of the constitution of the state. See *Commonwealth v. Gamble*, 62 Pa. St. 343, 347; *Mathis v. Rose*, 64 N. J. L. 45, 44 Atl. 875.

the will of the officer, where the officer is empowered to remove at pleasure. The fact that he is to receive a salary at a specified rate per annum, payable monthly, merely provides a mode of fixing the amount of his compensation and the time of its payment, but does not imply a contract of employment for the entire year. Nor do the additional facts that the assistant is selected at the beginning of the officer's term, and has actually entered, presumably on a four years' service, prove a special contract for the whole four years' service.<sup>20</sup>

A definite term prescribed by charter for officers does not necessarily apply to a position like that of an assistant or subordinate the term of which continues during the pleasure of the appointing power.<sup>21</sup> It will hardly be accepted as a sound proposition that a definite term can be predicated of a tenure at will.<sup>22</sup>

Although the proposition be invoked that, in contemplation of law, the assistant's position may end with that of the officer, yet if he is permitted to continue service undisturbed by the officer's successor, he thereby becomes the new officer's assistant at the pleasure of the officer, and, if necessary, the law will presume his appointment.<sup>23</sup>

20. See *Knowles v. Boston*, 12 Gray (Mass.) 339, 340.

21. *State ex rel v. Johnson*, 123 Mo. 43, 49, 27 S. W. 399.

22. See *Speed v. Crawford*, 3 Met. (Ky.) 207; *Gibbs v. Morgan*, 39 N. J. Eq. 126.

23. 1 *Dillon, Mun. Corp.* (5th Ed.), § 393; *Angell & Ames, Corp.*, § 284; *Bank v. Dandridge*, 12 Wheat. (U. S.), 64, 70, 6 L. Ed. 552; *Kiley v. Forsee*, 57 Mo. 390, 396; *Mun. Code of St. Louis* (1901), § 1587, note.

**Tenure of assistant ceases with that of officer, when.** As relates to the office or position of the deputy of a sheriff, the general rule, in the absence of contrary

provision, is that the deputy's commission runs only while the principal's term lasts. When the office of sheriff expires by constitutional or statutory limitation, his appointments of deputies are, *eo instanti*, revoked by operation and implication of law. *Greenwood v. State*, 17 Ark. 332, 338; *Banner v. McMurray*, 1 Dev. (N. C.) 219; *Boardman v. Halliday*, 10 Paige (N. Y.) 223.

But it has been adjudged that the term of an officer appointed to hold "during the pleasure of the governor for the time being," does not expire with the term of the office of the governor making the appointment. Here it was con-

### § 493. How offices may be lost.

Offices may be lost other than by expiration of the term or abolition of the office or resignation in the following ways: First, by removal in the manner provided by law; second, by the acceptance of a free pass or ticket at a discount, from a railroad or other transportation company where the law so prescribes;<sup>24</sup> third, by ceasing to possess the qualifications prescribed, as by failing to reside within the limits or jurisdiction of the city, or of the ward or municipal subdivision from which the officer

tended, as quaintly observed by the court, "with seeming gravity," that the above quoted words meant that if the governor did not remove the officer during his gubernatorial term, the tenure of his appointment ceased, by operation of law, with the term of the governor. The point was thus denied: "The authorities produced do not sustain any such construction of the language, and the uniform practice of both the state and national government, negatives the idea." *Kaufman v. Stone*, 25 Ark. 336, 344.

A mayor's secretary who holds his position only during the mayor's pleasure, is removed whenever a new secretary is appointed and assumes the duties of the office. *McKannay v. Horton*, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661.

Under laws empowering a coroner to appoint a physician to be known as coroner's physician, such appointment is for a term coterminous with that of the coroner making the appointment. *People v. Goldenkranz*, 78 N. Y. S. 267, 38 Misc. Rep. 682.

The engagement of one to furnish a horse and wagon to the city and drive same for a *per diem* wage is purely contractual and may be terminated by the city in accordance with its terms at any time and the employee discharged without a hearing on charges. *People v. Redfield*, 83 N. Y. S. 873, 86 App. Div. 367.

Superintendent of streets, held deputy of department as to removal. *People v. Armbuster*, 59 Hun (N. Y.) 586, 13 N. Y. S. 942.

Assistants, defined under St. Louis Charter. *State ex rel v. Longfellow*, 95 Mo. App. 668, 69 S. W. 596; *State ex rel v. Longfellow*, 93 Mo. App. 664, 67 S. W. 665.

See § 425 *ante*.

See *Hawkins v. Newman*, 4 Mees. & W. 613.

"A valid provision of an ordinance in relation to the employment of city employees enters into the contract of employment as effectually as if written in the contract." *State v. Kent*, 98 Mo. App. 281, 71 S. W. 1066.

24. Const. Mo. art. XII, § 24.

was chosen; <sup>25</sup> fourth, any failure on the part of the officer to pay into the treasury of the city the balance reported by the proper authorities to be due from him to the city, upon the adjustment of his accounts, shall cause a forfeiture of his office, by virtue of some charters; <sup>26</sup> fifth, by a conviction of willful, corrupt or fraudulent violation or neglect of official duties; <sup>27</sup> sixth, assistants or deputies and other subordinates, although officers, may be removed "at pleasure" by the officer under whom they work, unless such power is restricted by law.<sup>28</sup>

**§ 494. Officer has no vested right in office—office may be changed or abolished.**

In England, offices are considered incorporeal hereditaments, grantable by the crown and a subject of vested or private interest. But in this country they are not held by grant or contract, nor under our system of government has any person a private property or vested right or interest in them.<sup>29</sup>

As expressed in an Illinois case: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices

25. § 450 *ante*.

26. Charter St. Louis, art. IV, § 43.

27. Const. of Mo. art. XVI, § 7; Municipal Code of St. Louis (1901, McQuillin), § 1592.

§ 550 *post*.

28. Charter of St. Louis, art. IV, § 14; Revised Code of St. Louis (1907, Woerner), p. 351.

§ 492 *ante*.

29. *Georgia*. Dallis v. Griffin, 117 Ga. 408, 43 S. E. 758; *Collins v. Russell*, 107 Ga. 423, 33 S. E. 444.

*Michigan*. Rice v. Ionia Prob. Judge, 141 Mich. 692, 105 N. W. 17.

*Missouri*. State v. Evans, 166 Mo. 347, 66 S. W. 355.

*North Carolina*. Mial v. Ellington, 134 N. C. 131, 46 S. E. 961, overruling Hoke v. Henderson 15 N. C. 1.

*New York*. People v. Coler, 173 N. Y. 103, 65 N. E. 956, 76 N. Y. S. 205, 71 App. Div. 584.

*Wisconsin*. State ex rel. v. Trustees, 121 Wis. 44, 98 N. W. 954; State v. Dahl, 140 Wis. 301, 122 N. W. 748.

*United States*. Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187.

But see Hobbs v. Uppington, 28 Ky. L. Rep. 131, 89 S. W. 128.

are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his but the public benefit. It would be a misnomer and a perverting of terms to say that an incumbent owned an office, or had any title to it."<sup>30</sup>

Therefore, in the absence of limitations in the organic law, all officers—federal, state and municipal—are subject to such modifications and changes as the proper authorities may deem advisable, irrespective of the consent of the officer. No law reducing the salary of an officer, imposing additional duties without increasing the compensation, or abolishing the office, will be held unconstitutional as "impairing the obligation of contracts" or as depriving any person of property "without due process of law," notwithstanding the officer is elected or appointed for a definite term.<sup>31</sup>

30. *Donahue v. Will County*, 100 Ill. 94.

31. *Georgia*. *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172.

*Louisiana*. *Barrett v. New Orleans*, 32 La. Ann. 101.

*Missouri*. *State ex rel. v. Walsh*, 69 Mo. 408; *State ex rel. v. Davis*, 44 Mo. 129; *State ex rel. v. Valle*, 41 Mo. 29; *State v. Hermann*, 11 Mo. 43; *Wilcox v. Rodman*, 46 Mo. 322; *Westberg v. Kansas City*, 64 Mo. 493.

*New Jersey*. *Boylan v. Newark*, 58 N. J. L. 133, 32 Atl. 78; *Burlington v. Estlow*, 43 N. J. L. 13; *Butcher v. Camden*, 29 N. J. Eq. 478.

No impairment of obligation of contract. "An appointment to a public office is not a contract within that clause of the constitution which forbids the state legislature to pass any law impairing the obligation of contracts. The de-

sign of that clause was in the language of Chief Justice Marshall, to restrain the legislature from violating the right of property, from impairing the obligation of contracts respecting property, under which some individual could claim a right to something beneficial to himself. And because an appointment to office is not such contract, it is not within the prohibition of the constitution." *Hoboken v. Gear*, 27 N. J. L. 265, 278.

The right to compensation grows out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him. *Connor v. Mayor, etc. of N. Y.*, 1 Selden (5 N. Y.) 285, 296.

A public office is not property within the meaning of the constitutional provisions that "no per-



All offices are created for the public good, and unless restraint exists in the organic law are completely subject to the power creating them.<sup>32</sup> Thus an office not fixed by the constitution, but established by statute, may be abolished by statute.<sup>33</sup> But without express authority a municipal office created by the legislature cannot be abolished by ordinance.<sup>34</sup> Where a municipal corporation

son shall be deprived of life, liberty or property without due process of law and the judgment of his peers." It is a mere public agency revocable according to the will and appointment of the people, as expressed in the constitution and the laws enacted in conformity therewith. An officer may be removed without jury trial. *Moore v. Strickling*, 46 W. Va. 515, 50 L. R. A. 279, 33 S. E. 274; *Atty. Gen. v. Jochim*, 99 Mich., 358, 58 N. W. 611, 23 L. R. A. 699; *People v. Kipley*, 167 Ill. 638, 49 N. E. 229.

"The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust, to be exercised for the benefit of the public. Such salary as may be attached to it is not given because of any duty on the part of the public to do so; but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of time thereto." *State v. Hawkins*, 44 Ohio St. 98, 109, 5 N. E. 228.

*Contra.* It may be noted that some cases—although very few—oppose the above doctrine. They have adopted the theory that an

office is property, under the mistaken view that the common law doctrine that an office is a hereditament applies to the offices of this country, which is undoubtedly fallacious and against the decided and overwhelming weight of authority. The following cases support this view: *King v. Hunter*, 65 N. C. 603; *Brown v. Turner*, 70 N. C. 93; *Vann v. Pipkin*, 77 N. C. 408; *Plimpton v. Somers*, 33 Vt. 283; *Board v. Pritchard*, 36 N. J. L. 101; *Page v. Hardin*, 8 B. Mon. (Ky.) 648, 672; *Commonwealth v. Silfer*, 25 Pa. St. 23.

32. *Farwell v. Rockland*, 62 Me. 296, 299.

33. *Standeford v. Wingate*, 2 Duvall's Ky. Rep. 440.

34. *Marquis v. Santa Ana*, 108 Cal. 661, 37 Pac. 650; *Vason v. Augusta*, 38 Ga. 542.

The express power conferred by the legislature on the council to determine the number of the members of the police department and the classes or grades into which they shall be divided, includes the right to abolish any position therein which the council may deem necessary. *People v. Ham*, 166 N. Y. 477, 60 N. E. 191, reversing 68 N. Y. S. 298.

under its charter or legislative act applicable has power to create by ordinance an office, it also has power to abolish it. The principle applicable is that power to create gives power to abolish, unless restrained by law.<sup>35</sup> But where the office is created by ordinance it can only be abolished by ordinance and not by resolution.<sup>36</sup> A legal provision that no officer shall be removed, except for cause, does not prevent the abolishment of an office

35. *Georgia*. *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *Raley v. Warrenton*, 120 Ga. 365, 47 S. E. 972.

*Illinois*. *People v. Brown*, 83 Ill. 95; *Crook v. People*, 106 Ill. 237.

*Indiana*. *Downey v. State*, 160 Ind. 578, 67 N. E. 450; *Ewing v. Bell*, 116 Ind. 1, 18 N. E. 363; *State ex rel. v. Bogard*, 128 Ind. 480, 27 N. E. 1113; *Goodwin v. State*, 142 Ind. 172, 41 N. E. 359; *State v. Wilson*, 142 Ind. 102, 41 N. E. 361.

*Kentucky*. *Frankfort v. Brawner*, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497, 18 Ky. L. Rep. 684.

*Maine*. *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

*Maryland*. *Robinson v. Baltimore*, 93 Md. 208, 49 Atl. 4.

*Massachusetts*. *Donaghy v. Macy*, 167 Mass. 178, 45 N. E. 87; *Chandler v. Lawrence*, 128 Mass. 213.

*Michigan*. See *Attorney General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699; *Attorney General v. Cogshall*, 107 Mich. 181, 65 N. W. 2.

*Missouri*. *Primm v. Carondelet*, 22 Mo. 22; *Wilcox v. Rodman*, 46 Mo. 322.

*New York*. *Smith v. New York*,

37 N. Y. 518; *People v. Brooklyn*, 149 N. Y. 215, 43 N. E. 554.

*Ohio*. *State v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

*Pennsylvania*. *Com. v. Moir*, 7 Lack. Leg. N. 50.

*Tennessee*. *Waldraven v. Memphis*, 4 Coldw. (44 Tenn.) 431.

*Wisconsin*. *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87.

*Utah*. *McAllister v. Swan*, 16 Utah 1, 50 Pac. 812; *Heath v. Salt Lake City*, 16 Utah 374, 52 Pac. 602.

36. *San Antonio v. Micklejohn*, 89 Tex. 79, 33 S. W. 735.

Boards and departments may be abolished. *Sheridan v. Colvin*, 78 Ill. 237.

Sergeant of police abolished by ordinance, irrespective of action of police commissioner, under particular charter. *Oldham v. Birmingham*, 102 Ala. 357, 14 So. 793.

Where laws authorize heads of departments to employ such laborers as may be necessary for the efficient working of their department or as may be necessary for the inspection of certain work, the head of the department may abolish such positions after they have been filled by appointment. *People v. Scannell*, 62 N. Y. S. 930.

in the absence of restrictions in this respect.<sup>37</sup> Likewise the fact that the officer is appointed or elected for a definite term is no limitation of the power to abolish.<sup>38</sup>

An unconditional repeal of a municipal charter, or the substitution of another with inconsistent provisions, without a saving clause respecting offices and officers as they existed under the former charter, will operate to abolish all offices thereunder.<sup>39</sup> The term of a charter officer may be shortened by amendment to the charter.<sup>40</sup> It is also established that an office may be abolished by an authorized repeal of the law, whether it be a charter, statutory or ordinance provision creating it.<sup>41</sup>

The office may be abolished by creating another office and conferring the same powers and duties thereon.<sup>42</sup> Thus the legislature may abolish the office of mayor and create another officer to perform the same duties.<sup>43</sup> The abolition of a department abolishes the offices of that department.<sup>44</sup> A municipality may, at its pleasure,

37. *Oldham v. Birmingham*, 102 Ala., 357, 14 So. 793; *People v. Brooklyn*, 149 N. Y. 215, 43 N. E. 554, reversing 36 N. Y. S. 172; *Meissner v. Boyle*, 20 Utah 316, 58 Pac. 1110; *People v. York*, 60 N. Y. S. 208.

38. *Boylan v. Newark*, 58 N. J. L., 133, 32 Atl. 78; *Frankfort v. Brawner*, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497; *Butcher v. Camden*, 29 N. J. Eq. 478, distinguishing *Bradshaw v. Camden*, 39 N. J. L. 416.

39. *Crook v. People*, 106 Ill. 237; *People v. Feitner*, 30 N. Y. App. Div. 241, 51 N. Y. S. 1094, affirmed, 156 N. Y. 694, 51 N. E. 1093.

40. See *People v. Davie*, 114 Cal. 363, 46 Pac. 150; *Frankfort*

*v. Brawner*, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497.

41. *State ex inf. v. Rackliffe*, 164 Mo. 453, 64 S. W. 772; *Chandler v. Lawrence*, 128 Mass. 213; *State ex rel. v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

A board of improvements may be abolished by repealing the ordinance creating it. *Toledo v. Lake Shore & Michigan Southern Ry. Co.*, 2 Ohio Cir. Ct. Dec. 450.

42. *Com. v. Reese*, 16 Ky. L. Rep. 493, 29 S. W. 352.

43. *Com. v. Moir*, 199 Pa. St. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801.

44. *People v. Stewart*, 78 N. Y. S. 473, 75 App. Div. 497.

abolish an office created by it for which the charter did not provide.<sup>45</sup>

In accordance with the principle that all offices are subject to change, the proper authorities may legally impose additional duties upon an officer without creating a new office or entitling the incumbent to higher compensation.<sup>46</sup>

### § 495. Resignation of office.

At common law an officer was not at liberty to resign his office.<sup>47</sup> A few states have enforced this common-law

45. *Raley v. Warrenton*, 120 Ga. 365, 47 S. E. 972.

**Laws abolishing offices.** The office of water registrar of the former city of Brooklyn was abolished by the charter of New York which provides that all offices forming a part of the local government of the municipal corporations, and parts thereof, consolidated into the City of New York, are abolished as to all territory embraced within the limits of the city except as otherwise provided. *People v. Oakley*, 87 N. Y. S. 856, 93 App. Div. 535.

A department of inspection created by ordinance cannot survive in the charter as a bureau of inspection created by an amendment to the charter which abolished such department. *Cutshaw v. Denver*, Colo. App. (1894), 75 Pac. 22.

When a statute transferred the legislative functions of certain cities from a common council to a municipal assembly composed of two houses, and the emergency clause declared that, as there were cities desirous of making such change at the next April election,

the act should be in force from and after its passage, the common council of such cities did not immediately go out of existence, but continued in office until such election. *Hilgert v. Barber Asph. Co.*, 187 Mo. App. 385, 81 S. W. 496.

46. See *Redwood City v. Grimmstein*, 68 Cal. 512, 9 Pac. 560.

May be reduced unless law forbids. *State v. Starkey*, 49 Minn. 503, 52 N. W. 24.

47. At common law an officer could not resign. "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and the government, to

rule;<sup>48</sup> however, in most jurisdictions the right to resign a public office is sanctioned.<sup>49</sup>

The acceptance of an office does not constitute a contract as so to preclude the incumbent from resigning.<sup>50</sup> A town officer may resign with the consent of the town.<sup>51</sup>

Where the resignation must be tendered in a particular manner and published, a communication to the mayor and council tendering a resignation is insufficient.<sup>52</sup>

bear. And from this it follows of course that after an office was conferred and assumed it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws." Willcock, Corp., p. 129; Grant, Corp., pp. 221, 223, 268; Rex v. Bower, 1 Barn. & Cress. 585, 2 D. & R. 842, 8 E. C. L. 247; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Stra. 920; Rex v. Jones, 2 Stra. 1146; Hope v. Henderson, 4 Dev. L. (N. C.) 1, 25 Am. Dec. 677; Van Orsdall v. Hazard, 3 Hill. (N. Y.) 243; State v. Ferguson, 31 N. J. L. 107.

48. State v. Clayton, 27 Kan. 442, 41 Am. Rep. 418; Hoke v. Henderson, 4 Dev. L. N. C. 1, 25 Am. Dec. 677; Coleman v. Sands, 87 Va. 689, 13 S. E. 148; Fryer v. Norton, 67 N. J. L. 537, 52 Atl. 476, affirming 67 N. J. L. 23, 50 Atl. 661; State v. Ferguson, 31 N. J. L. 107; Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314.

49. People v. Porter, 6 Cal. 26; State v. Lincoln, 4 Neb. 260; Reiter v. State, 51 Ohio St. 74, 23 L. R. A. 681, 36 N. E. 943.

50. Prim v. Carondelet, 23 Mo. 22.

51. Cloutman v. Pike, 7 N. H. 209.

52. Lewis v. Oliver, 4 Abb. Pr. (N. Y.) 121.

**Resignation in England of elective officers.** (1) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof.

(2) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant. 45 and 46 Vict. c. 50, § 36.

Whether an alderman elected to, and accepting the office of councillor is liable to the fine, has never been decided. See Rex v. Bangor Corporation, 18 Q. B. D. 349, 51 J. P. 51, 56 L. J. Q. B. 326, 56 L. T. 434, 35 W. R. 158, 3 T. L. R. 176.

Resignation without payment of the fine would not be effectual. By the delivery of the writing to the town clerk and the payment of the fine, the resignation binds the giver of it, and cannot after-

### § 496. Resignation by implication or abandonment of office.

Abandonment of an office may be treated as a construction resignation,<sup>53</sup> *e. g.*, where an alderman refuses to attend the meetings of the council.<sup>54</sup> But what acts will constitute abandonment or implied resignation of an official depends, of course, upon the circumstances of the particular case and the controlling law. Thus a mere failure to attend the regular meetings of the board does not *per se* constitute resignation of the office. The absence must be so long continued as to raise the presumption that abandonment of the office was intended, *e. g.*, absence of eight months from the regular meetings of the board.<sup>55</sup>

wards, even with the consent of the council, be withdrawn (*Rex v. Wigan Corporation*, 14 Q. B. D. 908, 49 J. P. 327, 54 L. J. Q. B. 338, 52 L. T. 435, 33 W. R. 547, 1 T. L. R. 370), and delivery of a cheque which has not been cashed has been regarded as payment (*ibid*). The office does not, indeed, become vacant until it is formally declared to be so, but in the interval the resigning holder cannot act (*Pease v. Lowden*, 1 Q. B. 386, 63 J. P. 56, 68 L. J. Q. B. 239, 79 L. T. 672, 15 T. L. R. 147).

In the event of the council refusing to declare the vacancy, no election can be held to supply the vacancy in the council. The remedy would be by mandamus against the council to compel them to declare the office to be vacant (*Rex v. Wigan Corporation*, *supra*). *Arnold's Mun.*

*Corp.* (5th Ed., London), pp. 64, 65.

53. *State v. Allen*, 21 Ind. 516; *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993.

**Resignation by abandonment.** Under a rule providing that unexplained absence without leave for five days shall at the option of the police board be deemed and held to be a resignation the act of a police officer who had been requested by the board to resign for the good of the service, but refused to do so and left the room and did not report until six days thereafter, may, in the discretion of the board be treated as a resignation. *People v. Diehl*, 167 N. Y. 619, 60 N. E. 1118, affirming 50 App. Div. 58, 63 N. Y. S. 362.

54. *People v. Hanifan*, 96 Ill. 420, 6 Ill. App. 158.

55. *Harrison v. People*, 36 Ill. App. 319.

So the resignation of an officer cannot be presumed in all cases because of failure to perform the duties appertaining to the office.<sup>56</sup>

Under a charter conferring power upon the council to declare the office of any councilman vacant where such councilman absents himself from three consecutive meetings without permission of the council the vacancy can only be declared for the cause stated.<sup>57</sup>

Removal from the city or town, or from the ward or municipal subdivision that the member of the legislative body represents, is sometimes regarded as an abandonment of the office, or as a resignation by implication.<sup>58</sup>

§ 497. Resignation or abandonment of office by election to, or acceptance of, another office.

Ordinarily the acceptance by an officer of another office incompatible with the first constitutes an abandonment or resignation of the first office. This is the rule of the common law.<sup>59</sup>

56. *Tiles v. Ashborton*, 31 N. H. 304.

Failure to qualify is not abandonment. *State v. Peck*, 30 La. Ann. 280.

57. *State v. Ballard*, 10 Wash. 4, 38 Pac. 761.

58. *Curry v. Stewart*, 8 Bush. (Ky.) 560.

See § 450 *ante*.

59. *Arkansas. State Bank v. Curran*, 10 Ark. 142.

*Connecticut. Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375.

*Louisiana. State v. West*, 33 La. Ann. 1261.

*Tennessee. State v. Grace*, 113 Tenn. 9, 82 S. W. 485.

Acceptance of another office as abandonment. Under statutes prohibiting persons from holding

two municipal offices at the same time, and providing that the acceptance of a second office incompatible with the first shall vacate the first, the acceptance by a city clerk of the office of assessor vacates the office of clerk but does not invalidate the acts of the assessor. *Blades v. Falmouth*, 30 Ky. L. Rep. 420, 98 S. W. 1017.

The acceptance by a policeman of the office of deputy constable after an attempted discharge, is an abandonment of the office of policeman. *Paris v. Cabines*, Tex. Civ. App. (1906), 98 S. W. 925.

Acceptance by an alderman of an office incompatible with the duties of alderman, held abandonment of latter office. *People v. Hanifan*, 96 Ill. 420, 6 Ill. App. 158.

It is sometimes held that if the law in express terms forbids acceptance of another office this renders an officer ineligible to fill another office; hence, an appointment, for example, of a councilman to another office and his acceptance thereof do not work an abandonment of his office as councilman because the appointment to the second office is absolutely void.<sup>60</sup>

Under the provisions of the constitution of Texas that "no person shall hold or exercise at the same time more than one civil office of emolument," the acceptance by a city officer of another office and his qualification therefor

Laws forbidding that the same person shall fill a municipal office and a county office. *Keating v. Covington*, 18 Ky. L. Rep. 245, 35 S. W. 1026; *People v. Murray*, 73 N. Y. 535.

Sometimes mere acceptance of another office amounts to an abandonment. Thus an alderman elected as a representative in congress vacates the former office. *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659.

**England.** A councillor who is elected an alderman thereby vacates his office of councillor. Notwithstanding the old decision of *Rex v. Coaks*, 3 El. & Bl. 251, 23 L. J. Q. B. 134, it would seem that an alderman may be elected a councillor, vacating his seat as alderman, upon acceptance of his new office; it was, at least, so held by the Court of Appeal in *Rex v. Bangor Corporation* 18 Q. B. D. 349, 51 J. P. 51, 56 L. J. Q. B. 326, 56 L. T. 434, 35 W. R. 158, 3 T. L. R. 176, but the House of Lords declined to express any opinion on a point. See *Pritchard v. Mayor*

of Bangor, 13 App. Cas. 241, 52 J. P. 564, 57 L. J. Q. B. 313, 58 L. T. 502.

In Scotland it has been held, following the Court of Appeal in the Bangor case, *supra*, that a councillor sitting for one ward may be elected councillor for another ward, his old office becoming vacant either upon his acceptance of his new office, or upon his formal resignation of his old one (it was necessary to decide which). *Marwick v. Gibson*, 5 F. 154. *Arnold's Mun. Corp.* (5th Ed. London), pp. 30, 31.

60. *State v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027.

Under a law providing that any person holding an office under the city shall be deemed to have vacated it by accepting any office under the government of the United States or the state, one appointed by the judge of a state court is an officer of the court and not of the city although his salary is paid out of the city treasury. *O'Brien v. New York*, 84 N. Y. 50, 32 N. Y. S. 34.



operated *ipso facto* as a resignation of the former office.<sup>61</sup>

It has been held that where the law does not make it a cause of forfeiture mere acceptance of another municipal office by a member of a board of trustees of a town does not constitute an abandonment or resignation.<sup>62</sup>

### § 498. Acceptance of a resignation.

A resignation may be accepted, first, by a formal declaration, and second, by the appointment or election of a successor.<sup>63</sup>

The general rule applicable to all public officers is that a resignation of the office does not become complete until it is presented to the proper authority and accepted by it. "In the absence of any special rule prescribing to what authority a resignation should be presented, the proper authority to accept a resignation is that which has power to fill the vacancy."<sup>64</sup>

In a New Jersey case a councilman tendered his resignation to the mayor and council—the proper authority—and it was laid before the council by the presiding mayor and acceptance refused. Here it was held that the incumbent remained in office.<sup>65</sup>

61. *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

62. *Santa Ana Water Co. v. San Buena Ventura*, 65 Fed. 323.

63. *People v. Hanifan*, 6 Ill. App. 158; *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Willcock, Mun. Corp.* 239.

In England when an elective officer resigns "the council shall forthwith declare the office to be vacant." 45 and 46 Vict. c. 50, § 36. See n. 52 to § 495 *ante*.

Evidence of acceptance of resignation is shown where the council treated the office vacant and filled it. *Bath v. Reed*, 78 Me. 276, 4 Atl. 688.

Acceptance of a resignation is shown on the part of a council by electing the one who tenders it to another office. *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

64. *Fryer v. Norton*, 67 N. J. L. 537, 52 Atl. 476.

A resignation sent to the mayor elect instead of to the mayor in office does not justify the latter in making a new appointment on newspaper rumor of resignation. *State v. Pullman*, 18 Ohio Cir. Ct. Rep. 304.

65. *Fryer v. Norton*, 67 N. J. L. 537, 52 Atl. 476, affirming 67 N. J. L. 23, 50 Atl. 661.

A resignation to take effect at a future day named when accepted by competent authority is valid and will take effect according to its terms.<sup>66</sup> The acceptance of a resignation terminates the term of the office;<sup>67</sup> however, the officer resigning will not be relieved of the duties and responsibilities imposed by law during his incumbency of the office.<sup>68</sup> Thus a city treasurer cannot by resigning his office take from the city any remedy for any wrongs done during his term of office.<sup>69</sup>

Some courts have held that in the absence of legal provision, resignation takes effect without acceptance, for the reason that the holding of an office is not compulsory; and in such case, a successor may be appointed or elected without the formal acceptance of the resignation.<sup>70</sup>

In some jurisdictions it has been held that where the law provides that the officer shall hold office until his successor is chosen and qualified the incumbent cannot be relieved from the duties of the office by the acceptance of his resignation.<sup>71</sup>

66. *Whitney v. Van Buskirk*, 40 N. J. L. 463.

67. *People v. Hanifan*, 96 Ill. 420; *Pariseau v. Board of Ed.*, 96 Mich. 302, 55 N. W. 799; *State v. Lincoln*, 4 Neb. 260.

**Acceptance ends the term.** The acceptance by the council of the resignation of one of its members absolutely terminates the term of office of such member, and his subsequent withdrawal of such resignation with the consent of the council will not entitle him to hold the office for the remainder of the term. *State v. Grace*, 113 Tenn. 9, 82 S. W. 485.

The constitutional and statutory provisions that every officer shall hold office until his successor is elected or appointed and qualified do not apply to the resignation of an office so as to prevent it

from becoming effective. *State v. Grace*, 113 Tenn. 9, 82 S. W. 485.

68. *Gorgas v. Blackburn*, 14 Ohio 252.

69. *Philadelphia v. Marcer*, 1 Leg. Gaz. Rep. (Pa.) 355.

70. *California*. *People v. Porter*, 6 Cal. 26.

*Nebraska*. *State v. Lincoln*, 4 Neb. 260.

*Nevada*. *State v. Clark*, 3 Nev. 566.

*Ohio*. *Riter v. State*, 51 Ohio St. 74, 23 L. R. A. 681, 36 N. E. 943.

*Virginia*. *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338.

71. *Illinois*. *People v. Barnett Tp.*, 100 Ill. 332.

*Texas*. *Jones v. Jefferson*, 66 Tex. 576.

*United States*. *Badger v. United States*, 93 U. S. 599, 23 L. Ed.

8. POWERS AND FUNCTIONS OF OFFICERS, SUBORDINATES AND EMPLOYEES, AND MISCELLANEOUS MATTERS INCIDENT THERETO.

§ 499. Powers and functions of officers in general.

As heretofore stated, the powers of the municipal corporation are derived from the charter or act of incorporation, and, hence, its officers may only perform such duties as are prescribed therein or by legislative act applicable, or which may be implied, or which are indispensable, in order to enable the corporation to perform the purposes of its creation. In the discharge of their duties the officers cannot go beyond the law,<sup>72</sup> nor delegate their powers, wherein judgment and discretion must be exercised.<sup>73</sup> These rules are firmly established and enforced uniformly by the courts. Municipal officers are only agents of the local public in its corporate capacity; they act under defined powers and duties, limited and restricted by law; and, within the scope of their functions, may bind the corporation by their acts;<sup>74</sup> however, if they exceed their authority, the corporation is not liable.<sup>75</sup>

991; *United States v. Green*, 53 Fed. 769.

Compare *Olmsted v. Dennis*, 77 N. Y. 378.

See § 487 *ante*.

72. *Illinois*. *Ward v. Cook*, 78 Ill. App. 111.

*Kentucky*. *Keller v. Wilson*, 90 Ky. 350, 12 Ky. L. Rep. 471, 14 S. W. 332.

*Louisiana*. *Louisiana State Bank v. New Orleans Nav. Co.*, 3 La. Ann. 294; *Livandais v. Municipality No. 2*, 16 La. Ann. 509.

*Michigan*. *Stevenson v. Bay City*, 26 Mich. 44; *Schwartz v.* v. 90 Mich. 267, 51 N. W. 279.

*York*. *People v. Ransom*, 50 Barb. (N. Y.) 514.

*Washington*. *Scott v. Forrest*, 13 Wash. 106, 42 Pac. 519.

73. *California*. In re *Guerro*, 69 Cal. 88, 10 Pac. 261.

*Missouri*. *Edwards v. Kirkwood*, 147 Mo. App. 601, 610, 127 S. W. 378; *State ex rel. v. Skranka* Const. Co., 226 Mo. 229, 232, 126 S. W. 397.

*New Jersey*. *Reed v. Camden*, 50 N. J. L. 87, 11 Atl. 137.

*Texas*. *Beard v. Decatur*, 64 Tex. 7, 53 Am. Rep. 735.

§ 483 to 487 *ante*.

74. General responsibility of directors of private corporation applies. *Cincinnati v. Cameron*, 33 Ohio St. 336.

75. *Keller v. Wilson*, 90 Ky. 350, 14 S. W. 332; *Burns v. New York*, 3 Hun (N. Y.) 212, 5 Thomp. & C. 371.

The principle is well established that a public or governmental corporation like a municipal corporation is not estopped by the acts of its officers when they exceed their powers. The rule is that persons dealing with such officers must at their peril ascertain the scope of their authority. The doctrine that principals are estopped to deny the authority of agents acting within the scope of their power usually does not apply to public officers.<sup>76</sup>

The powers of municipal corporations, the construction thereof, and the manner of their exercise are treated fully in prior chapters of this work.<sup>77</sup>

The numerous cases in the note illustrate many applications of the rule relating to the scope of the functions of different kinds of municipal officers.<sup>78</sup>

76. *Indiana*. Union School Tp. v. First National Bank, 102 Ind. 464, 2 N. E. 194; *Rissing v. Ft. Wayne*, 137 Ind. 427, 37 N. E. 328.

*New York*. *Miller v. New York*, 3 Hun (N. Y.) 35, 5 Thomp. & C. 219.

*Ohio*. *Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445.

77. Chapters 9, 10, 11 *ante*.

78. Miscellaneous powers and duties of officers illustrated. In the absence of authority conferred by charters, the water commissioner of New York City has no power to purchase real estate for extending the water works system, without the approval of the board of aldermen. *Queens County Water Co. v. Monroe*, 82 N. Y. S. 610, 83 App. Div. 105.

Under a statute requiring a water commissioner to test water meters approved by the board of aldermen, such commissioner cannot be compelled by *mandamus* to make a number of individual tests after having found, by a thorough test, one of them defective. *Peo-*

*ple v. Monroe*, 82 N. Y. S. 603, 44 App. Div. 241.

Usually their duties are confined to municipal affairs, and they cannot without express authority attend to state functions. *Calais v. Whidden*, 64 Me. 249.

Municipal officers cannot restrict or qualify by ordinance or otherwise any of the powers conferred by statute applicable to the municipality, e. g., powers conferred upon a commission for opening and improving streets. *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Baltimore v. Aull*, 104 Md. 107, 64 Atl. 702.

A village treasurer has no power to distribute license moneys collected by him among the school districts within the corporate limits in a manner different from that fixed by law. *Kas v. State*, etc. Neb. (1902), 88 N. W. 776.

**Removal of dirt.** It cannot be said as a matter of law that a street and park commissioner has no authority to remove dirt, rubbish, etc., from the streets under

### § 500. Power of officer to select subordinates, employees, agents, etc.

Unless authorized by law the officer has no power to employ subordinates or persons to assist him in the performance of his public duties. Usually such power is conferred by charter or ordinance; sometimes in express terms; sometimes by necessary implication. The number

a statute requiring him to repair and maintain streets. *Connor v. Manchester*, 73 N. H. 233, 60 Atl. 436.

**City jailer.** An ordinance requiring a city jailer to perform the duties of janitor in the city hall and other city offices is not invalid where a statute provides that the jailer "shall perform such duties as the general council may by ordinance prescribe." *Paducah v. Evitts*, 120 Ky. 444, 27 Ky. L. Rep. 867, 86 S. W. 1123.

**Street repairs.** Under New Hampshire laws, when the city councils legally vote an appropriation for repairing streets, the duty of carrying the vote into practical effect devolves upon the board of aldermen. *Hett v. Portsmouth*, 73 N. H. 334, 61 Atl. 596.

**Records.** An ordinance requiring a city engineer to preserve all plans, and documents pertaining to his office and deliver them to his successor in office, does not require him to turn over to his successor field notes made by him in surveying lots of individual owners under their employment and at their expense. *Leflingwell v. Miller*, 20 Colo. App. 429, 79 Pac. 327.

A city collector can not bind the city by any legal opinion he may

give. *Chicago v. Malkan*, 119 Ill. App. 572. *Malkan v. Chicago*, 217 Ill. 471, 75 N. E. 548.

**Council.** In the absence of express authority conferred by charter a city council has no power to order the city fire department to take part in a parade to advertise the city. *Blankenship v. Sherman*, 33 Tex. Civ. App. 507, 76 S. W. 805.

A city comptroller has no authority to bind the city by any admission of statement he might make pertaining to the payment of an order drawn upon the city for funds due a contractor for the erection of a water works. *Dickerson v. Spokane*, 35 Wash. 414, 77 Pac. 730.

Where the city comptroller is empowered to perform such duties in relation to the finances of the city as shall be prescribed by ordinance, he is authorized to negotiate and dispose of city bonds provided for by ordinance. *Stevenson v. Bay City*, 26 Mich. 44.

**Council officer** without express authority cannot interfere in the management of other public corporations although embraced within the city's limits. *People v. Neilson*, 48 How. Pr. (N. Y.) 454.

City council may investigate officers and their departments and

and nature of such employees is controlled by the character of the service to be performed. Moreover, the work to be done must be within the scope of the power of the municipal corporation, for if the act to be performed is

have access to official books and papers. *Schwartz v. Barry*, 90 Mich. 267, 51 N. W. 279.

An appointee to the common council has the legal right to the custody and possession of the books and papers belonging to the office. *In re Haase, etc.*, 83 N. Y. S. 932, 41 Misc. Rep. 114.

**Permits—conditions.** Under the New York charter which gives the commissioner of water supply, gas and electricity cognizance and control of the construction of subways and requires his permit in writing therefor, he is authorized to impose, as a condition of granting such permit that the subway company should bear all reasonable expense of inspection within the jurisdiction of such commissioner. *People v. Monroe*, 83 N. Y. S. 382, 85 App. Div. 542, affirmed in 176 N. Y. 567, 68 N. E. 1122.

**Town clerk.** A statute conferring upon a town clerk all the powers and duties of a justice of the peace constitutes such town clerk a court. *Baltimore & O. R. Co. v. Whiting*, 161 Ind. 228, 68 N. E. 266.

A building commissioner may employ a janitor. *State v. Smith*, 15 Mo. App. 412; *Kennedy v. New York*, 79 N. Y. 361.

**Night watchman** may be employed by governor of public works. *Gadd v. Detroit*, 142 Mich.

683, 106 N. W. 210, 12 Det. Leg. N. 900.

**Engineer.** The employment of a supervising engineer by the board of sewer commissioners of a village subsequently annexed to a city in New York is not binding on such city, where the city has never recognized such employment. *Mack v. New York*, 75 N. Y. S. 809, 37 Misc. Rep. 371.

**Architect.** Where a statute imposed upon the commissioner of public works the duty of making plans and specifications for the construction and alteration of public buildings a resolution of the council authorizing the city comptroller to employ an architect to do such work is an encroachment upon the authority of the commissioner. *Moreland v. Common Council, etc.*, 130 Mich. 343, 9 Det. Leg. N. 48, 89 N. W. 935.

A city may employ architect. *Egan v. Chicago*, 5 Ill. App. 70; *Upjohn v. Taunton*, 6 Cush. (60 Mass.) 310; *Peterson v. New York*, 17 N. Y. 449.

**Clerks.** Commissioners empowered to appoint their own clerk. *In re Board of Public Improvements of New York*, 77 N. Y. S. 1078, 38 Misc. Rep. 509.

**Police surgeon.** Under the charter of Rochester, N. Y., the commissioners of police have implied power to employ a police surgeon at the expense of the city. *Cain v. Warner*, 60 N. Y. S. 769.

beyond the scope of the municipal powers all contracts relating thereto will be considered *ultra vires* and void.<sup>79</sup>

Thus if a city has no power to establish a quarantine against persons and property, a contract for services in connection therewith is void.<sup>80</sup> So the local corporation cannot employ a physician to perform a surgical operation on a pauper.<sup>81</sup> But if a city has power to light its streets and to operate its own plant it may employ a lineman for this purpose.<sup>82</sup> So a municipal corporation may employ one to secure needed right of way.<sup>83</sup> However, if the right of way is to be procured fraudulently for a railroad company where the ostensible object is a street the contract is *ultra vires*.<sup>84</sup>

If a town has power to employ an agent it is sometimes held that such agents may employ a detective and

79. Usually power to employ is conferred by charter or ordinance. Resolution authorizing a temporary clerk. *Costello v. New York*, 63 N. Y. 48.

Board of public works may employ and confer the power to hire and discharge men; held not a delegation. *Hathaway v. Des Moines*, 97 Iowa 333, 66 N. W. 188.

Agents may be employed and appointed, whose acts will bind the town. *Indianapolis v. Skeen*, 17 Ind. 628; *New Orleans v. Southern Bk.*, 31 La. Ann. 560; *Pittston v. Clark*, 15 Me. 460; *Judevine v. Hardwick*, 49 Vt. 180; *Hunneman v. Fire District*, 37 Vt. 40.

Towns held not liable for agent's unauthorized acts. *Baltimore v. Eschbach*, 18 Md. 276; *Baldwin v. Logansport*, 73 Ind. 346; *Davis v. Philadelphia*, 3 Phila. (Pa.) 374.

Local corporation is not bound beyond agent's special authority. *Barnes v. Philadelphia*, 3 Phila. (Pa.) 409.

Four agents employed cannot be given power to select a fifth. *Tampa v. Salomonson*, 35 Fla. 446, 17 So. 581.

Janitor. The board of public service in certain Ohio cities has no authority to employ a janitor for a city building in the absence of a certificate to the city council from the auditor that the money appropriated to meet the expense of employment is in the city treasury. *Pittinger v. Wellesville*, 75 Ohio St. 508, 80 N. E. 182.

80. *New Decatur v. Berry*, 90 Ala. 432, 24 Am. St. Rep. 827, 7 So. 838.

81. *Barber v. Saginaw*, 34 Mich. 52.

82. *Rockebrandt v. Madison*, 9 Ind. App. 227, 53 Am. St. Rep. 348, 36 N. E. 444.

83. *Stewart v. Council Bluffs*, 58 Iowa 642, 12 N. W. 718.

84. *Strahan v. Malvern*, 77 Iowa 454, 42 N. W. 369.

bind the town for his services.<sup>85</sup> The employment of one to exercise a franchise which the city is not lawfully entitled to exercise is *ultra vires*.<sup>86</sup>

Some charters confer on the officer or head of a department full authority to select all of his subordinates, deputies, clerks and employees, and where such charter power exists the officer cannot be deprived of his power of selection on the part of the legislative body by ordinance, resolution or otherwise.<sup>87</sup> The power of appointment conferred by charter or statute cannot be taken away by ordinance.<sup>88</sup>

### § 501. Power to employ attorneys.

Whether attorneys may be employed in behalf of the municipal corporation will depend upon the proper construction of the law under which such employment is sought to be sustained, the nature of the services performed by the attorney, or in the absence of legal provisions pertaining thereto, the character of the litigation or legal controversy involved and the interest which the public corporation has therein.<sup>89</sup> Unless forbidden by

85. *Sargent v. Bristol*, 2 Hask. 112, Fed. Cas. No. 12,363.

Compare *Tampa v. Salomonson*, 35 Fla. 446, 17 So. 581.

86. *Perry v. Superior City*, 24 Wis. 64.

87. *The Municipal Code of St. Louis* (1901, McQuillin), p. 385, § 89; *Peters v. Bell*, 51 La. Ann. 1621, 26 So. 442.

88. *Horan v. Lane*, 53 N. J. L. 274, 21 Atl. 302.

89. **Power to employ attorneys.** Cannot be employed when. *Wallace v. San Jose*, 29 Cal. 180; *Smith v. Sacramento*, 13 Cal. 531.

May employ. *Culler v. Carthage*, 103 Ind. 196, 53 Am. Rep. 504, 2 N. E. 571; *Goodwin v. State ex rel.*, 142 Ind. 117, 41 N. E. 359;

*Downey v. State*, 160 Ind. 578, 581, 67 N. E. 450.

City solicitor cannot employ attorney without express authority. *Fletcher v. Lowell*, 15 Gray (81 Mass.) 103.

Power to employ attorneys. 54 Cent. L. J. 343.

Without authority council cannot employ attorney. *Lyddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155. Compare *Kramrath v. Albany*, 127 N. Y. 578, 28 N. E. 400.

Employment of an attorney to perform services which the law requires the city attorney to perform is void. *Clough v. Hart*, 8 Kan. 487.



law when a necessity arises therefor and the interests of the municipal corporation requires it, the employment of legal services will usually be sanctioned.<sup>90</sup>

### § 502. Who authorized to employ attorney.

The question who is authorized to employ an attorney will depend upon the laws applicable, if any exist, and the nature of the service to be performed. Sometimes the employment may be made by the council or governing

Council committee cannot bind the corporation to pay for services of an attorney employed by it for work which the law requires the legal department to do. *Rawson v. New York*, 4 Abb. Pr. (N. Y.) 342; *Roberts v. New York*, 5 Abb. Pr. (N. Y.) 41; *State ex rel. v. Krez*, 88 Wis. 135, 138, 59 N. W. 593.

90. **Interest to city.** To defend suit brought against mayor and other officials for malfeasance in office and seeking injunction, there is no liability on part of city to pay. *Smith v. Nashville*, 72 Tenn. (4 Lea) 69.

When necessity arises and law does not forbid, special counsel may be employed by city council. *Boise v. Randall*, 8 Idaho 119, 66 Pac. 933.

The services must be within the power of the corporation or necessarily incident thereto. *Memphis v. Adams*, 56 Tenn. 518, 24 Am. Rep. 331.

If the legal services pertain to the prosecution of a crime against the laws of the state, the city is not bound to pay therefor. *Butler v. Milwaukee*, 15 Wis. 493.

When vacancy in office, attorney may be employed. *Roodhouse v. Jennings*, 29 Ill. App. 50.

When city attorney refuses to represent city, special attorney may be engaged. *Curtis v. Gowen*, 34 Ill. App. 516.

See chapter on Municipal Contracts, volume 3, where this subject is more fully treated.

legislative body,<sup>91</sup> or by the mayor,<sup>92</sup> or other officers or boards.<sup>93</sup>

In the New England states it is sometimes held that a town agent appointed to prosecute an action may employ an attorney.<sup>94</sup> So a committee created for this purpose may employ an attorney although the purposes may be illegal.<sup>95</sup>

The rule forbidding municipal officers from delegating their powers to others is applicable here. Thus the council cannot delegate its power to employ an attorney to the mayor.<sup>96</sup> So, a committee of the council cannot

**91. Council may employ attorneys.** *New Athens v. Thomas*, 82 Ill. 259; *Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *Goodwin v. State ex rel.*, 142 Ind. 117, 41 N. E. 359.

**Selectmen of town may employ attorney.** *Farrel v. Derby*, 58 Conn. 234, 7 L. R. A. 776, 20 Atl. 460; *Burton v. Norwich*, 34 Vt. 845.

**Aldermen or council or governing legislative body.** *Hoxsey v. Paterson*, 45 N. J. L. 186.

**Trustees of village.** *Wilson v. Omro*, 52 Wis. 131, 8 N. W. 821.

A village board of health has no power to employ counsel in actions for penalties in the name of the village, and for its benefit though law empowers it to employ such persons as may be necessary to enable it to carry into effect its orders and regulations. *Reynolds v. President, etc.*, 92 N. Y. S. 954, 102 App. Div. 298.

**92. Mayor.** *Louisville v. Murphy*, 86 Ky. 53, 5 S. W. 194.

**Mayor must have express authority.** *Fletcher v. Lowell*, 15 Gray (81 Mass.) 103.

**President of village cannot.** *Mark v. West Troy*, 69 Hun (N. Y.) 442, 23 N. Y. S. 422.

**Mayor, city attorney and treasurer may employ attorney.** *Memphis v. Brown*, 87 U. S. (20 Wall.) 289, 22 L. Ed. 264.

**93. Certain boards of cities are empowered to employ special counsel, and need not rely upon the city attorney.** *Freeman v. Brooks*, 62 N. Y. S. 761, 29 Misc. Rep. 719.

**Overseers of the poor of town may employ attorney.** *Burton v. Norwich*, 34 Vt. 345.

**Public administrator of city may employ attorney.** *Nash v. New York*, 4 Sandf. (6 N. Y. Super. Ct.) 1.

**Commissioners appointed for a special purpose cannot employ an attorney without express authority.** *Boggs v. Sinking Fund Commissioners*, 10 N. J. L. 219.

**94. Buckland v. Conway**, 16 Mass. 396.

**95. Cushing v. Stoughton**, 6 Cush. (60 Mass.) 389.

**96. East St. Louis v. Thomas**, 11 Ill. App. 283.

employ an attorney, in the absence of express authority to do so.<sup>97</sup> Nor can this power be delegated by the mayor and council to the city collector.<sup>98</sup>

### § 503. Same—method of employment.

If the law prescribes a particular method by which the employment of the person is to be made, of course such requirement should, in substance, be observed, as where it should be in writing,<sup>99</sup> or, where it is made by a board the board must act as a unit when legally convened,<sup>1</sup> or where the employment is to be approved or confirmed, failure renders the employment void.<sup>2</sup> The employment of an agent need not be by formal ordinance, by-law, or resolution, nor is it essential unless the law so requires, that such contract be in writing. It may arise by implication or by ratification of acts done by an agent.<sup>3</sup> Sometimes the employment may be made by the council, on motion, in the absence of ordinance authorizing the employment.<sup>4</sup>

97. *Ramson v. New York*, 24 Barb. (N. Y.) 226, 15 How. Pr. (N. Y.) 145.

98. *Edwards v. Kirkwood*, 147 Mo. App. 601, 610, 127 S. W. 378.

Delegation of power is forbidden, §§ 383 to 387 *ante*.

99. *Butler v. Charlestown*, 73 Mass. 12.

Contract to be in writing and as law prescribes or void. *Crutchfield v. Warrensburg*, 30 Mo. App. 456.

1. When by board must act as a unit, and employment taken by majority vote. *Delaware Co. Comrs. v. Sackrider*, 35 N. Y. 154.

See ch. 13 *post*, § 595 *ante*.

2. If resolution of council, employing clerk, is to be approved

by mayor, failure voids resolution. *People v. Schroeder*, 12 Hun (N. Y.) 413.

3. *Wilt v. Redkey*, 29 Ind. App. 199, 64 N. E. 228.

Method. Of broker to sell bonds, need not be in writing. *Reed v. Orleans*, 1 Ind. App. 25, 27 N. E. 109.

Employees. Implied requests for services and implied promise to pay therefor may under certain circumstances, be raised. *Tufys v. Chester*, 62 Vt. 353, 19 Atl. 988; *Cincinnati v. Philadelphia*, 1 Conn. Rep. (Ohio) 278.

Compare *Clarendon v. Philadelphia*, 13 Phil. (Pa.) 54.

4. *Taylorville v. Hogan*, 130 Ill. App. 70.

In Oklahoma, the common council of a city of the first class has the power, by ordinance or resolution passed in open meeting by such body, held in the regular way, to employ an attorney to assist the city attorney in any legal matters in which the city is interested.<sup>5</sup>

#### § 504. Same—ratification of unauthorized employment.

Sometimes ratification of unauthorized employment will be sanctioned by the law.<sup>6</sup>

#### § 505. Officers to give entire time to public duties.

Many laws, in express terms, provide that the officer shall give his entire time during office hours to the discharge of the duties appertaining to the office.<sup>7</sup> However,

5. *Treeman v. Perry*, 11 Okla. 66, 65 Pac. 923.

**Contract of employment.** Where a city attorney and associates to be selected by him were authorized by resolution of the board of aldermen to collect back taxes and retain a percentage thereof for fees, there was a contract by the city with the city attorney and not the associates. *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543.

See § 530 *post*.

6. **May ratify unauthorized.** *Salman v. Haynes*, 50 N. J. L. 97, 11 Atl. 151; *Hanson v. Dexter*, 36 Me. 516.

**Acts constituting ratification.** *Mound City v. Snody*, 53 Kan. 126, 35 Pac. 1112; *Peterson v. New York*, 17 N. Y. 449, reversing 4 E. D. Smith 413; *Smith v. New York*, 67 Barb. (N. Y.) 223; *Van Warb v. New York*, 52 How. Pr. (N. Y.) 78; *Beers v. Dallas City*, 16 Ore. 334, 18 Pac. 835; *Ward v. Forest*

*Grave*, 20 Or. 355, 25 Pac. 1020; *Denison v. Foster* (Tex. Civ. App. 1894), 28 S. W. 1052.

Acts not constituting ratification. *Owenboro v. Weir*, 95 Ky. 158, 24 S. W. 115; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Mason v. New York*, 28 Hun (N. Y.) 115; *Bryan v. Page*, 51 Tex. 522, 32 Am. Rep. 637.

See § 467 *ante*.

7. **Officers to give entire time.** "No person elected or appointed to any office or employment of trust or profit under the laws of this state, or any ordinance of any municipality in this state, shall hold such office without personally devoting his time to the performance of the duties to the same belonging." Const. Mo. 1875, art. II, § 18.

**Any officer except those subject to removal by impeachment,** "who shall fail personally to devote his time to the performance of the duties of the office," \* \* \* "shall

it may be affirmed that such requirement is contemplated, without express declaration.<sup>8</sup>

### § 506. Classification of employees—civil service.

In New York the act of classification by a civil service commission is regarded as a legislative or administrative, as distinguished from a judicial, act and cannot be reviewed by the courts.<sup>9</sup> There, it seems the only control the courts can exercise over such an act is a limited and qualified one by *mandamus* in cases where the act sought to be controlled is so palpably violative of the law as to present no fair ground for difference of opinion among intelligent and conscientious officials.<sup>10</sup>

### § 507. Promotions in office and public place.

Promotions in office or public situation may be made from time to time by the proper authority without restrictions; however, when the exercise of this privilege is regulated by law, all promotions must be made in accordance therewith. Such provisions exist where a merit system has been established in the municipal service, and

forfeit his office and may be removed therefrom." R. S. Mo. 1909, § 10204.

"Any city officer, except the mayor and commissioners on charitable institutions, who shall except when absent from the city, fail to devote his entire time during business hours to the duties of his office, shall be removed or suspended by the mayor or council." St. Louis Charter, art. IV, § 11; Revised Code of St. Louis (1907, Woerner), p. 350.

8. As relates to the Mayor of St. Louis no deduction from his legal salary can be made for ab-

sence. *Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701.

9. *People ex rel. v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *People v. McAdoo*, 99 N. Y. S. 324, 113 App. Div. 770; *In re Hammond*, 124 N. Y. S. 406, 140 N. Y. App. Div. 19.

10. *People ex rel. v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *People v. McAdoo*, 99 N. Y. S. 324, 113 App. Div. 770; *In re Hammond*, 124 N. Y. S. 406, 140 N. Y. App. Div. 19, reversing *Hammond v. Ricker*, 121 N. Y. S. 696, 66 Misc. Rep. 526.

are often made applicable to police and fire departments. Such laws have received the sanction of the courts.<sup>11</sup> Power is generally conferred upon the civil service boards or commissioners to make reasonable rules for the promotion of public servants.<sup>12</sup> These rules, ordinarily, have the force of statutes and are subject to the same construction.<sup>13</sup> They, of course, must conform with the law, otherwise they will be declared invalid by the courts,<sup>14</sup> wherein power is vested to review them.<sup>15</sup>

When such rules exist promotions must be made in accordance with them.<sup>16</sup> Sometimes the power to promote officers, as police officers for acts of heroism is not affected or modified by the civil service law.<sup>17</sup>

### § 508. Reduction in office and public place.

When laws prescribe the manner in which officers and employees may be reduced to a lower grade, the view of the courts is that these laws must, in good faith, be observed. Rules appertaining to this matter are subject to review by the judiciary and may be declared illegal or unreasonable. Notice and opportunity to be held is

11. *Illinois*. Ptacek v. People, 94 Ill. App. 571, 62 N. E. 530; People v. Ferrant, 229 Ill. 56, 82 N. E. 271.

*New York*. People v. McAdoo, 96 N. Y. S. 362, 110 App. Div. 740, affirmed in 184 N. Y. 575; People v. Baker, 97 N. Y. S. 453, 49 Misc. R. 143; People v. Baker, 108 N. Y. S. 969, 124 App. Div. 565; In re Dryer, 102 N. Y. S. 922, 52 Misc. Rep. 612; People v. Partridge, 85 N. Y. S. 853, 89 App. Div. 497; People v. McAdoo, 95 N. Y. S. 400, 403, 404, 108 App. Div. 1; Hale v. Worstell, 95 N. Y. S. 485, 48 Misc. R. 339; People v. Tully, 95 N. Y.

S. 916, 47 Misc. Rep. 275, affirmed, 95 N. Y. S. 916, 1153, 108 App. Div. 345.

12. In re Ricketts, 98 N. Y. S. 502, 111 App. Div. 669.

13. People v. Neville, 109 N. Y. S. 640, 58 Misc. Rep. 279.

14. Hule v. Worstell, 95 N. Y. S. 485, 48 Misc. Rep. 339, affirmed 185 N. Y. 247.

15. In re Ricketts, 98 N. Y. S. 502, 111 App. Div. 669.

16. People v. McAdoo, 95 N. Y. S. 400, and 403, 108 App. Div. 1.

17. People v. Knox, 166 N. Y. 444, 60 N. E. 17.

generally required. An officer illegally reduced may appeal to the courts for redress.<sup>18</sup>

§ 509. Transfer of officers and employees.

Laws and municipal charters often provide for the transfer of officers and employees on specified conditions from one office or department of the municipal corporation to another office or department, and in making such transfers the legal provision appertaining thereto must, in substance, be obeyed.<sup>19</sup>

§ 510. Power to grant leave of absence and vacation.

Unless expressly forbidden by law it is fair to assume that the head of a department or a chief officer possesses authority to grant a reasonable leave of absence to an officer or employee under him on account of sickness or in the interest of the health of the employee, or for other good reason.

Under the New York charter a fire commissioner has power to grant the chief of the department a leave of absence for the benefit of his health, and to relieve him from duty during such time if he refuses to accept the same.<sup>20</sup> And in Massachusetts it is held that where a

18. *Hansen v. Van Winkle* (Sup. N. J., 1908), 69 Atl. 1011; *People v. Greene*, 84 N. Y. S. 484, 87 App. Div. 421; *In re Ricketts*, 98 N. Y. S. 502, 111 App. Div. 669; *People v. Greene*, 90 N. Y. S. 833, 99 App. Div. 495; *People v. Greene*, 86 N. Y. S. 322, 91 App. Div. 58, 178 N. Y. 617, 70 N. E. 1106; *Walters v. New York*, 105 N. Y. S. 950, 119 App. Div. 464, affirmed in 190 N. Y. 375, 83 N. E. 48.

In New York a statute forbidding the reduction in rank of police officers was declared void. *People v. Partridge*, 77 N. Y. S. 691, 74 App. Div. 291.

19. A transfer of an expert accountant's assistant to the position of disbursing clerk by the comptroller without authority from the commission is illegal. *People v. Grout*, 90 N. Y. S. 861, 45 Misc. R. 47.

Transfer of employee by head of department must be recognized by the latter's successor. *Allen v. New York*, 104 N. Y. S. 919, 120 App. Div. 539.

20. *People v. Sturges*, 79 N. Y. S. 640, 78 App. Div. 184; Appeal *In re Croker*, 175 N. Y. 158, 67 N. E. 307, dismissed.

charter authorizes the city to make reasonable provisions for preserving the public peace and maintaining its internal police the city has power to grant a reasonable vacation to policemen not subjecting it to additional expense.<sup>21</sup>

Charters sometimes permit in express terms the granting of leave of absence to officers and employees.<sup>22</sup>

### § 511. Pensions for officers and employees.

Laws exist providing that under named conditions certain classes of officers may be retired and obtain designated sums from time to time from the public treasury in the form of a pension. Such laws contemplate meritorious service for a considerable time which is often specified, and also, a named age limit.<sup>23</sup>

21. *Wood v. Haverhill*, 174 Mass. 578, 55 N. E. 381.

22. Leave of absence may be granted by mayor. "The mayor may grant in writing a temporary leave of absence to any officer for a term not exceeding twenty days which shall be filed with the register, and any officer absenting himself from the city for the period of one week without such leave, shall thereby vacate his office, and no officer shall receive any salary during the time he is absent from the city without leave." Revised Code of St. Louis (1907, Woerner), § 1688, p. 908.

23. *Clark v. Police, etc. Board*, 127 Cal. 550, 59 Pac. 994; *State v. Trustees, etc.*, 18 Ohio Cir. Ct. 887.

**Validity of pension laws.** A law requiring fire insurance companies to pay a portion of their earnings to create a pension fund for firemen is not a lawful exercise

of the police power of the state. *Henderson v. London, etc. Ins. Co.*, 135 Ind. 23, 28, 34 N. E. 565, 41 Am. St. Rep. 410.

A statute providing for taxation of insurance companies doing business in cities having a fire department, to provide a fund for the benefit of disabled and superannuated firemen and their families is unconstitutional in violating the requirement as to uniformity, and in granting pensions to persons not rendering military or naval services. *Aetna Fire Ins. Co. v. Jones*, 78 S. C. 445, 59 S. E. 148, 13 L. R. A. (N. S.) 1147.

Local regulations cannot vary statutory provisions. *Buckendorf v. Minn. F. D. R. Assn.*, 112 Minn. 298, 127 N. W. 1133.

**Pending charges.** Under a statute providing for the retirement on a pension of a member of the police force who has served twenty



The pension allowed to municipal officers does not arise from contract or vested right, but is a matter of bounty to be given or withheld at the pleasure of the sovereign power.<sup>24</sup> Hence, a member of the police force has no vested right in a police pension fund created by act of the legislature and the legislature has power to repeal the same.<sup>25</sup> And the fact that policemen contribute a certain amount per month from their salaries toward a pension fund, does not give them contractual rights to a pension under the statutes, which precludes revocation or destruction by subsequent legislation.<sup>26</sup> However, a change in a law providing for pensions to policemen cannot deprive the widow of a policeman of her right to a pension which vested in her by the death of her husband before such change.<sup>27</sup>

Laws granting pensions will not be construed as retrospective when there is nothing in the act to indicate an intention on part of the legislature to make it so.<sup>28</sup>

years, provided there are no charges pending against him, an anonymous communication containing no statement of facts constituting a breach of duty on his part, which came to the police commissioner two weeks before the application for retirement was filed, cannot be regarded as a "charge" pending. *People v. Greene*, 181 N. Y. 308, 73 N. E. 1111, reversing 90 N. Y. S. 162, 97 App. Div. 502.

**Voluntary contribution.** Moneys retained out of the monthly pay of a policeman and paid to a police pension fund in accordance with charter, are not voluntary contributions. *Burke v. Board of Trustees*, 4 Cal. App. 235, 87 Pac.

421; *Penny v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

24. *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174.

25. *State v. Farley*, 22 Ohio Cir. Ct. Rep. 48; *Friel v. McAdoo*, 91 N. Y. S. 454, 101 App. Div. 155; *Penny v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

26. *State v. Board of Trustees, etc.*, 121 Wis. 44, 98 N. W. 954.

27. *Kavanaugh v. Board of Police Pension Fund Commissioners*, 134 Cal. 50, 66 Pac. 36.

28. *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174; *Burke v. Board of Trustees, etc.*, 4 Cal. App. 235, 87 Pac. 421; *People v. Partridge*, 172 N. Y. 305, 65 N. E. 164, 17, reversing 77 N. Y. S. 1137, 74 App. Div. 620.

A statute providing for the creation of a policeman's pension fund in cities of the first class is not unconstitutional, though it applies to only one city in the state.<sup>29</sup>

Sometimes organizations or associations are authorized by law to be created in which certain local officers may become members, e. g., policemen and firemen, and on account thereof are entitled to benefits in case of sickness or other disability.<sup>30</sup>

### § 512. Same—granting of pensions, how far discretionary.

Laws authorizing the granting of pensions of the character mentioned in the preceding section are usually construed as conferring a discretionary power on those in which the power to investigate and grant is vested, and, ordinarily, it cannot be controlled by *mandamus*.<sup>31</sup> The act of passing on applications for pensions involves the exercise of judicial power, and it has been held that the finding of the body authorized to act in granting pensions is not subject to review except for want of authority to grant the pension or for fraud of the applicant in procuring it.<sup>32</sup>

29. *State v. Board of Trustees*, etc., 121 Wis. 54, 98 N. W. 954.

See §§ 205, 206 *ante*.

30. *Leffingwell v. Kiersted*, 74 N. J. L. 407, 65 Atl. 1029.

**Sick Benefit—Interest.** A claim against a benefit association for sick benefits does not bear interest until demand is made. *Dary v. Providence Police Association*, 27 R. I. 377, 62 Atl. 513.

By-laws of a benefit association requiring application for sick benefits to be made by members within one week from the commencement of the sickness, relate only to sickness or disability commencing thereafter. *Dary v. Provi-*

*dence Police Assn.*, 27 R. I. 377, 62 Atl. 513.

31. *Friel v. McAdoo*, 91 N. Y. S. 454, 101 App. Div. 155, affirmed in 181 N. Y. 558, 74 N. E. 1117.

*Mandamus* will not lie to review the decision of a pension board on an application for a pension, as such a decision necessarily involves the exercise of judgment of the law and facts of the case. *State ex rel. v. Board of Trustees*, 117 La. 1071, 42 So. 566; *People v. Board of Trustees*, 95 Ill. App. 300.

32. *Eddy v. People*, 218 Ill. 611, 75 N. E. 1071, affirming 120 Ill. App. 626.

As laws allowing pensions vary, and courts entertain different views concerning them, the rules of certain leading decisions will be set out. Under some laws no pension will be granted upon an application made after the applicant's discharge, e. g., from the police force.<sup>33</sup>

A board charged with the management of a police pension fund is not a trustee of an express trust for the persons entitled thereto, so as to prevent the running of the statute of limitations against a claim until a repudiation of the trust on part of the board.<sup>34</sup> In an action by the widow of a policeman to compel payment of a pension, the statute of limitations begins to run against the claim at the date of the death of the husband.<sup>35</sup>

Under a statute providing for retirement on pension of firemen who are found upon an examination by a medical officer duly ordered to make such examination to be permanently disabled, the medical officer has not power to decide that an applicant should be retired and pensioned.<sup>36</sup>

Under some laws, the employee who is placed on the retired list and pensioned does not cease to be a member of the department so as to preclude his widow from the right to the pension provided to be paid to widows of such members.<sup>37</sup>

Under a charter providing for pension to firemen after ten years' continuous service equal to one-half the salary, or such less sum as the condition of the pension fund will warrant, where the pension allowed a fireman is less than one-half salary, the burden of showing that

33. *People v. Board of Police Pension Fund Commissioners*, 116 Ill. App. 252; *McGann v. Harris*, 114 Ill. App. 308.

34. *Nicols v. Board of Police Pension Fund Com.*, 1 Cal. App. 494, 82 Pac. 557.

35. *Nicols v. Board of Police*

*Pension Fund Comrs.*, 1 Cal. App. 494, 82 Pac. 557.

36. *People v. Board of Trustees*, 95 Ill. App. 300.

37. *Kavanaugh v. Board of Police Pension Fund Comrs.*, 134 Cal. 50, 66 Pac. 36.

an allowance of the full amount was not warranted by the fund is on the fire commissioner.<sup>38</sup>

The widow of an employee of the fire department who died three weeks after his position was abolished is entitled to a pension under a law providing that, upon the abolition of any office or position the person filling the same shall be deemed suspended without pay and shall be entitled to reinstatement, if his services are needed within one year.<sup>39</sup>

A statute providing for the payment of a pension to the widow and children of any policeman, upon the death of such policeman from natural causes or while in the line of his duty, does not authorize a pension to the widow of a policeman who committed suicide, while insane, where the insanity was not the result of a performance of some duty.<sup>40</sup>

Under a law granting a pension to the widow of any member of the department fatally injured while in the performance of, or attempting to discharge, his duties, in the case of a fireman who was killed by falling from a street car while on his way from the firehouse to his home to get his meal, it was held that he was not killed in the performance of duty within the meaning of the law so as to entitle his widow to a pension.<sup>41</sup>

Under a charter providing for the compulsory retirement on a pension of a police officer who has become permanently disabled physically and mentally, so as to be unfit for duty, the test is whether such officer possesses the physical and mental qualifications sufficiently to perform the duties of the office he is then filling.<sup>42</sup>

38. *Ramsey v. Hayes*, 98 N. Y. S. 394, 112 App. Div. 442.

39. *Reidy v. New York*, 185 N. Y. 141, 77 N. E. 1011, reversing 93 N. Y. S. 16, 103 App. Div. 361.

40. *Hutchens v. Covert*, 39 Ind. App. 382, 78 N. E. 1061.

41. *Scott v. Jersey City*, 68 N. J. L. 687, 54 Atl. 441.

42. *Metcalf v. McAdoo*, 95 N. Y. S. 511, 48 Misc. Rep. 420; *People v. McAdoo*, 96 N. Y. S. 868, 109 App. Div. 892, 184 N. Y. 268, 77 N. E. 17.

**Retirement on pension.** The mere detail of a patrolman to perform the duties of a detective sergeant does not make him a holder

Under a statute granting pension to the widow of a fireman so long as she remains unmarried, the circumstances to be determined by the fire commissioner, *mandamus* will issue upon an application of the widow showing a *prima facie* right to the pension, to compel the commissioner to put her name on the list or show cause why it should not be done.<sup>43</sup>

Proceedings for retiring a policeman on a pension contemplate putting an end to his services in that way, and, to be eligible therefor, one must actually be a policeman up to the final order placing his name on the retired list.<sup>44</sup>

One who has served as a member of the police force for sixteen years and performed the duties of citizenship for twenty-one years, cannot be summarily removed from the pension roll for fraud committed by others without his knowledge in procuring his naturalization.<sup>45</sup>

### § 513. Municipal officers cannot be interested in contracts of any character with the city.

Municipal charters and laws usually forbid members of the council or governing legislative body, and all other

or occupant of such office and he is not entitled to retirement upon pension as such. *People v. Partridge*, 79 N. Y. S. 722, 78 App. Div. 204.

**Public purpose.** The creation of a pension fund to be placed in the hands of a fireman's relief association is not a public purpose for which a tax may be levied on fire insurance companies. *Aetna Fire Ins. Co. v. Jones*, 78 S. C. 445, 59 S. E. 148, 13 L. R. A. 1147.

43. *Tobin v. Scannell*, 72 N. Y. S. 184, 64 App. Div. 375.

Arrears claimed to be due on the pension of a retired fireman by reason of an unlawful determi-

nation of the fire commissioner in fixing the amount, cannot be recovered in an action for the amount claimed; the remedy being to correct such determination by a direct proceeding such as *mandamus*. *Ramsey v. Hayes*, 187 N. Y. 367, 80 N. E. 193.

44. A policeman who was injured and disabled from duty and then removed by the chief acting under authority of the charter, is not eligible for retirement on the pension list thereafter. *State v. Board of Trustees, etc.*, 123 Wis. 245, 101 N. W. 373.

45. *In re Hickey*, 106 N. Y. S. 148, 56 Misc. Rep. 118.

local officers from being directly or indirectly interested in any contract with the city, or any department or institution thereof. Some laws declare all such contracts void; and some prescribe criminal punishment.<sup>46</sup>

Experience has shown that public opinion alone is not sufficient to prevent the tendency to abuse in the manner

46. *California*. Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420.

*Illinois*. Dwight v. Palmer, 74 Ill. 295; Sherlock v. Winnetka, 68 Ill. 530, 59 Ill. 389; Bouton v. McDonough Co., 84 Ill. 384; Anna v. O'Callahan, 3 Ill. App. 176.

*Indiana*. Ft. Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

*Missouri*. St. Louis Charter, art. 4, § 6.

*New Jersey*. Klemm v. Newark, 61 N. J. L. 112, 38 Atl. 692.

*New York*. McAdams v. New York, 36 Hun (N. Y.) 340; Fitch v. New York, 40 Hun (N. Y.) 512.

*Pennsylvania*. Com. v. Whitman, 217 Pa. 411, 66 Atl. 986; Trainer v. Wolfe, 140 Pa. St. 279, 21 Atl. 391; Marshall v. Ellwood City, 189 Pa. St. 348, 41 Atl. 994.

*United States*. Santa Ana Water Co. v. San Buena Ventura, 65 Fed. 323.

See also chapter on contracts.

One in a fiduciary capacity cannot act with himself as an individual. San Diego v. San Diego & L. R. R. Co., 44 Cal. 106.

Rule applies to county boards. Andrews v. Pratt, 44 Cal. 309; Domingos v. Supervisors, 51 Cal. 608; Irwin v. Yuba County, 119 Cal. 686, 52 Pac. Rep. 35.

In England "a person shall be

disqualified for being elected and for being a councillor, if and while he has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council. But a person shall not be so disqualified, or be deemed to have any share or interest in such a contract or employment by reason only of his having any share or interest in (a) any lease, sale, or purchase of land, or any agreement for the same; or (b) any agreement for the loan of money or any security for the payment of money only; or (c) any newspaper in which any advertisement relating to the affairs of the borough or council is inserted; or (d) any company which contracts with the council for lighting or supplying with water or insuring against fire any part of the borough; or (e) any railway company, or any company incorporated by Act of Parliament or royal charter, or under the Companies Act, 1862 (or any society registered under the Industrial and Provident Societies Acts, 1893, and 1895)." 45 and 46 Vict. c. 50, § 12.

This has formed the subject-matter of numerous cases, which are collected, and the law therein stated in Arnold's Mun. Corp. (5th Ed., London), pp. 31 to 35.

under consideration. Therefore, the authoritative and ancient express prohibition "thou shall not" has been incorporated into the American municipal system, in order to correct corrupt tendencies, and the courts, with unanimity, enforce the high morality of official conduct by unhesitatingly characterizing such abuses as public wrongs, calculated to utterly destroy faithfulness and integrity in public service.

Some laws provide that no person shall be accepted as surety on a bond in which the city is interested who at the time is a member of the council or an officer of the city.<sup>47</sup>

The principle has always obtained that officers and directors of a corporation cannot enter into contracts with such corporation to do work for it, nor can they subsequently derive any benefit personally from such contract. They occupy a position of trust and must act in the utmost good faith. They will not be allowed to deal with the corporate funds and property for their private gain. They have no right to deal with themselves and for the corporation at the same time, and they must account for the profits made by the use of the company's moneys.<sup>48</sup>

Likewise, it is a fundamental rule applicable to both sales and purchases that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. "The expediency and justice of this rule are too obvious to require explanation."<sup>49</sup> The rule is not confined to transactions of private agents, but is applicable whenever the fiduciary

47. St. Louis Municipal Code (1901, McQuillin), § 1678; *Com. v. Allen*, 70 Pa. St. 464.

48. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Keokuk Packet Co. v. Davidson*, 95 Mo. 467, 8 S. W. 545; *Bent v. Priest*, 86 Mo. 475; *Manufacturers' Sav. Bk. v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S.

W. 865; *Rose v. Carbonating Co.*, 60 Mo. App. 28; *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229.

See *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951.

49. *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 28 Atl. 578.

relation arising out of the contract or condition of agency exists, and is enforced whether the agency is public, *quasi* public or private.<sup>50</sup>

That public officers are agents within the policy of the rule against allowing an agent to act both for himself and his principal in the same transaction has been declared frequently. Municipal officers and agents are held by the courts to a strict accountability in their dealings with or on behalf of the corporation. In acting for the corporation they are required to exercise the same fidelity, care and caution as would be expected of an individual purchasing for himself with his own money. It is obvious that a contrary view would be disastrous to the public service.<sup>51</sup>

50. Mechem, Pub. Off., § 840.

51. Contracts of officer with the city are illegal—illustrations. Interest of gas trustees in a contract to supply gas to certain manufacturers by a plant owned and operated by the city renders the contract void. *Dalzel Co. v. Findlay*, 5 Ohio Cir. Ct. Rep. 435.

Interest of a member of a board of public works in a railroad company which is granted a license by such board to lay tracks in the streets renders such license voidable. *West Jersey Traction Co. v. Board of Public Works of Camden*, 56 N. J. L. 431, 29 Atl. 163.

An agent of the municipality cannot contract with himself personally to perform a service which he is required to procure to be done. *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

Under such law a city judge cannot recover for the rent of a court room, hired of him by the city. *McGregor v. Logansport*, 79 Ind. 166.

A contract of a city in which a member of the city government is interested, being void, the city is not liable to trustee process in an action thereon. *O'Neil v. Flannigan*, 98 Me. 426, 57 Atl. 591.

Where the law expressly forbids, a contract by an officer with the trustees of a village to do work for the village to be paid out of the public treasury, is void. *Dwight v. Palmer*, 74 Ill. 295.

But such prohibition does not apply to an officer ordering an article by authority of the city and advancing the money to pay for it. *Anna v. O'Callahan*, 3 Ill. App. 176.

Interest of a village solicitor in a mortgage on property conveyed to the village which involved the assumption and payment of the mortgage by the village renders the contract illegal. *Marsh v. Hartwell*, 2 Ohio N. P. 389.

An allowance to a public officer by a contractor or employee, however small, is such evidence of



The adjudications afford many examples of the application of this doctrine in the various relations in which city and town officers and servants are required to act in behalf of the public. Thus, it has been held that a trustee or director of a school district is inhibited from entering into a contract to furnish labor or materials to build a schoolhouse for such district.<sup>52</sup> So, it has been expressly ruled that a member of a township board can-

fraud as will invalidate the contract. *Lindsey v. Philadelphia*, 2 Phila. (Pa.) 212.

A village treasurer who has no authority to make contracts is not within the meaning of laws prohibiting any officers from having an interest in contracts which he, or a board of which he is a member, is authorized to make on behalf of the village. *In re Kenmore*, 110 N. Y. S. 1008, 59 Misc. Rep. 388.

Contracts for the construction of any public work for the corporation made with officers are void. *Case v. Johnson*, 91 Ind. 477.

A contract, between the town and its treasurer for the improvement of a street at the expense of the property owners, is void. *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238.

Effect of curative statutes validating such contracts. *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238.

Within such law a member of the municipal board of health is an officer. *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

The secretary of a city board of health is an officer within the meaning of a statute prohibiting city officers from having an interest in city contracts. *Greenfield*

*v. Black*, 42 Ind. App. 645, 82 N. E. 797.

Although commissioners of highways who executed a contract in behalf of a town, authorizing a water company to erect waterworks, etc., such commissioners may be employed and paid by the company for their services in directing and supervising the laying of pipes, where it appears that the terms are fair and this did not influence unduly the making of the contract. *Nieoll v. Sands*, 131 N. Y. 19, 29 N. E. 818, affirming 14 N. Y. S. 448.

Under a charter provision forbidding officers from becoming interested in the performance of certain city contracts, and declaring that contracts so affected shall be voidable at the option of the comptroller, such a contract is enforceable unless the option to avoid it is exercised by the comptroller. *Munnally v. Board of Education*, 92 N. Y. S. 286.

Penalty. Some laws impose a penalty on officer who shall purchase any claim against the city. *Texas Anchor Fence Co. v. San Antonio*, 30 Tex. Civ. App. 561, 71 S. W. 301.

52. *Pickett v. School District*, 25 Wis. 551; *Currie v. School District*, 35 Minn. 163.

not legally contract to build piers for the township.<sup>53</sup> So, a contract made by a city council to employ one who is a councilman to render service to the city is bad.<sup>54</sup>

In a New Jersey case, four members of the city council were stockholders in a water company which the city council voted to purchase, and it was held that such purchase was unlawful. In this case it was aptly said: "The rule is one of policy, which, without regard to intention, inexorably reaches all contracts which contravene the purposes of the law."<sup>55</sup>

In a Pennsylvania case the majority of the members of the council were stockholders in a water company with which the council made a contract to supply the city with water, and it was held void. After quoting the state statute, the court observed: "It is almost needless to say that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing."<sup>56</sup>

53. *People v. Township Board*, 11 Mich. 222.

54. *Smith v. Albany*, 61 N. Y. 444; *Capron v. Hitchcock*, 98 Cal. 427.

55. *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 28 Atl. 578.

To the same effect is *Gregory v. Jersey City*, 34 N. J. L. 390.

56. *Milford Borough v. Milford Water Co.*, 124 Pa. St. 610, 17 Atl. 185.

**Contracts of councilmen with the city are void—Illustration.** A contract entered into with members of the city council is void. *McElhinney v. Superior*, 32 Neb. 744, 49 N. W. 705, following *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242.

A member of the council cannot lawfully contract with it for his own benefit, depending upon au-

thority derived from a vote of such council. *Stone v. Bevans*, 88 Minn. 127, 92 N. W. 520.

A constitutional provision forbidding public officers from being interested in contracts with the city applies to a contract by the city with an alderman, ratified by the council. *Noxubee County Hardware Co. v. Macon*, 90 Miss. 636, 43 So. 304.

In Kansas "An act to restrain state and county officers from speculating in their offices," was held not to include municipal officers and a contract made by a member of the council for printing the city ordinances was not invalid as against public policy. *Concordia v. Hagaman*, 1 Kan. App. 35.

In a New York case the council appropriated \$2500 for a Fourth of July celebration. Plaintiff, a mem-

These laws are ordinarily construed to apply both to express and implied contracts. Therefore a councilman who has expressly contracted with the city for the sale of lumber and materials to the city cannot recover their value upon an implied contract. The allowance of such claim by the city council does not render it valid.<sup>57</sup>

It is held in some cases, that where a contract is not expressly forbidden by law, between an official and the city, the demands of public policy have been satisfied by allowing the officer to recover, not on his contract, but on a *quantum meruit* or *quantum valebat*.<sup>58</sup>

ber of the council, furnished horses and vehicles to aid in the celebration, the use of which amounted to the fair value of \$139. It was held that he could not recover against the city under the New York statute which made it unlawful for a member of any city council to become a contractor under any contract authorized by the council. Here was an implied contract prohibited by statute as well as by considerations of public policy. *Smith v. Albany*, 61 N. Y. 444.

A selectman of a town cannot act for the town in making a loan of its money to himself. *Holderness v. Baker*, 44 N. H. 414.

A common council has no power to authorize one of its members to enter into a contract with the municipality for his own benefit, where the statute prohibits public officers from being interested in such contracts. *State v. Bevans*, 88 Minn. 127, 92 N. W. 520.

A statute which prescribes the qualifications of councilmen and prohibits them from being interested in contracts with the city, renders a contract between the city and a councilman void, and is

not a mere declaration of his eligibility to office. *Bradley & Gilbert v. Jacques*, 33 Ky. L. Rep. 618, 110 S. W. 836.

In a Nebraska case the plaintiff sued the city to recover for some printing. The chairman of the council committee on printing was a stockholder in the plaintiff company. The court held that the statute prohibiting officers from being interested in any contract with the city had reference to express contracts; that the contract under consideration was an express contract and therefore not prohibited. The case was discussed and decided on the question of public policy and recovery was allowed. *Call Publishing Co. v. Lincoln*, 29 Neb. 149.

57. *Berka v. Woodward*, 125 Cal. 119, 45 L. R. A. 420, 57 Pac. 777, 73 Am. St. Rep. 31.

58. *Spearman v. Texarkana*, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883; *Peckett v. School District No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Gardner v. Butler*, 30 N. J. Eq. 702; *Macon v. Huff*, 60 Ga. 221; *Currie v. School District No. 26*, 35 Minn. 163; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

It is said that in the absence of statute or charter provision, on the ground of public policy alone, an express contract entered into between the mayor and council, and one who is at the time a councilman of such city, for the performance of services for the city, will not be enforced.<sup>59</sup>

The rule obtains as expressed in a California case, that "members of city councils occupy a position of trust and are bound to the same measure of good faith toward their constituents that a trustee is to his *cestui que trust*,"<sup>60</sup> and "the fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction."<sup>61</sup> Thus a sale of merchandise by a councilman to the town is contrary to public policy and therefore void, although he refrained from voting for the purchase. And the fact that the town received and used the merchandise is not material.<sup>62</sup>

59. *Concordia v. Hagaman*, 1 Kan. App. 35.

A contract to lease a city park made by the mayor and city council is against public policy and void. *Macon v. Huff*, 60 Ga. 221.

60. *Woods v. Potter*, 8 Cal. App. 41, 95 Pac. 1125, 1127, citing *Andrews v. Pratt*, 44 Cal. 309.

61. *Woods v. Potter*, 8 Cal. App. 41, 95 Pac. 1125, 1127, citing *French v. Riverside*, 87 Cal. 597, 25 Pac. 765.

62. *Bay v. Davidson*, 133 Iowa 688, 111 N. W. 25, 9 L. R. A. (N. S.) 1014.

A statute prohibiting councilmen from having an interest in any contract or job of work does not apply to sales of merchandise to a town by a member of the council. Such a statute does not impliedly repeal the common law making such contracts void. *Bay*

*v. Davidson*, 133 Iowa 688, 111 N. W. 25, 9 L. R. A. (N. S.) 1014.

An assignment of city warrants to be issued for work performed under a contract with the city, made to the president of the council after the completion of the work, does not render him interested in the contract within the meaning of a provision which prohibits members of the council from becoming "interested in any contract or job, the expenses of which are paid out of the city treasury." *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132.

The fact that the mayor prior to his election became the assignee of a contract for street improvement as collateral security does not affect the validity of the contract, nor incapacitate him from countersigning a warrant issued

The policy of the law would seem to cover *partnerships* in which the officer is a member or pecuniarily interested and also a *corporation* in which the municipal officer is an officer, director or stockholder.<sup>63</sup>

for the collection of the assessment. *Beaudry v. Valdez*, 32 Cal. 269.

A note given to a member of the council for his profit in a contract in which he is interested made by the council is void in the hands of an assignee thereof. *Bell v. Quin*, 2 Sandf. (4 N. Y. Super. Ct.) 146.

An alderman who purchases a claim against the city for goods sold to it, is within a statute imposing a penalty upon any officer who shall contract for or be interested in the purchase of any draft or order on the city treasurer or any debt, claim or demand on which the city could be made liable. *Texas Anchor Fence Co. v. San Antonio*, 30 Tex. Civ. App. 561, 71 S. W. 301.

63. *Toronto v. Bowes*, 4 Grant (Can.) 489; *Brown v. Lindsay*, 35 Up. Can. Q. B. Div. 509.

**Partnerships.** A councilman who is a co-owner with his brother of a quarry cannot join in the ratifying by the council, as a member of such council, of a contract with his brother to supply the city with stone from such quarry. He is subject to penalty for such act. *Com. v. Whitman*, 117 Pa. St. 411, 418.

To the same effect, where facts were similar, see *McElhinney v. Superior*, 32 Neb. 744; *Hunnings v. Williamson*, L. R. 11 Q. B. Div. 533; *Mullaly v. New York*, 3 Hun (N. Y.) 661; *Moreland v.*

*Passaic*, 63 N. J. L. 208, 42 Atl. 1058.

Under a law which provided that "no member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof," it was held in Maine that one of the plaintiffs being a member of the city council, no action can be maintained to recover for medical services rendered by his firm to a pauper of his city. The case is put upon the ground that such contract is rendered void by the statute. *Goodrich v. Waterville*, 88 Me. 39, 41.

In *McManus v. Scheele*, 116 La. 71, 78, 40 So. 535, two contracts were involved, namely, one between the contractor and the city, and one between the contractor and others organized into a firm, to carry out the first contract. The court held that as the second contract was within the prohibition of the law it was tainted, and as a result both contracts were void.

In *Bell v. Quin*, 2 N. Y. Super. Ct. (Sandf.) 146, a member of the board was interested with another in a contract for supplying the corporation with coal, and received a note from the other person for half the profits of the contract. The assignee was denied the right to recover on the note.

A firm of attorneys cannot recover for services rendered the

### § 514. Reimbursing or indemnifying officer.

Where a municipal officer incurs a loss in the discharge of his official duty, in a matter in which the corporation has an interest, and in the discharge of a duty imposed or authorized by law, and in good faith, the municipal corporation has the power to appropriate funds to reimburse him, unless expressly forbidden.<sup>64</sup> And this it may do although it may turn out that the officer exceeded his legal rights and authority.<sup>65</sup> Thus where a mayor who in the performance of the duties of his office, in good faith, exceeds his authority which results in a judgment against him for false imprisonment, it is competent for the city to indemnify him for the expense of such judgment.<sup>66</sup> So it has been held to be legal for a town to

city under a contract made by the municipal board of which one of the attorneys was a member whose vote was necessary to a majority in favor of the contract. *Burkett v. Athens*, Tenn. Ch. App. (1900), 59 S. W. 667.

**Corporations.** *Santa Anna Water Co. v. San Buena Ventura*, 65 Fed. 323; *Finch v. Riverside & A. R. Co.*, 87 Cal. 597, 25 Pac. 765; *San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106; *Hardy v. Gainsville*, 121 Ga. 327, 48 S. E. 921; *Grand Island Gas Co. v. West*, 28 Neb. 852; *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431, 29 Atl. 163; *Com. v. De Camp*, 177 Pa. St. 112, 35 Atl. 601.

64. *Connecticut*. *Hotchkiss v. Plunkett*, 60 Conn. 230, 22 Atl. 535; *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485.

*Indiana*. *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504.

*Massachusetts*. *Bancroft v. Lynnfield*, 18 Pick. 566, 29 Am. Dec. 623; *Babbitt v. Savoy*, 3 Cush. 530; *Hadsell v. Hancock*, 3 Gray

526; *Nelson v. Milford*, 7 Pick. 18.

*New Hampshire*. *Pike v. Middleton*, 12 N. H. 278.

*New Jersey*. *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15; *State v. Hammonton*, 38 N. J. L. 430; *State v. Hudson*, 37 N. J. L. 254.

*New York*. *Sniffen v. New York*, 4 Sandf. (N. Y.) 193.

*North Carolina*. *Roper v. Laurinburg*, 90 N. C. 427, 7 Am. and Eng. Corp. Cas. 130.

*Pennsylvania*. *In re Auditors*, 8 Del. Co. (Pa.) 53.

*Rhode Island*. *Sherman v. Carr*, 8 R. I. 431.

*England*. *Attorney-General v. Norwich*, 2 Mylne & Cr. 406; *King v. Inhabitants of Essex*, 4 T. R. 591.

65. *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566, 29 Am. Dec. 623.

66. *Sherman v. Carr*, 8 R. I. 431, approved in *Roper v. Laurinburg*, 90 N. C. 427, 7 Am. and Eng. Corp. Cas. 130.

appropriate a reasonable amount of its funds to employ counsel to defend its police officers in actions for false imprisonment.<sup>67</sup>

Cases may and often do arise, in which towns may assume to indemnify their agents where the result of a trial at law clearly shows that the acts were illegal, provided such acts were done by the agents in the *bona fide* discharge of their duties.<sup>68</sup> It may assume the expense of a suit against its agent or servant in which the interests of the municipal corporation are directly involved.<sup>69</sup> Where a police officer, in the discharge of his duty, in attempting to kill a mad steer at large in a crowded street, shot a boy who recovered damages therefor, which the officer paid, the city had a right to reimburse him therefor.<sup>70</sup> So it may indemnify its school committee for expenses incurred in defending an action for an alleged libel contained in a report made by them in good faith and in which judgment was rendered in their favor.<sup>71</sup>

A variety of circumstances in which the municipal corporation may indemnify or reimburse appear from the cases in the note.<sup>72</sup>

67. *Roper v. Laurinburg*, 90 N. C. 427, 7 Am. and Eng. Corp. Cas. 130.

68. *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; *Nelson v. Milford*, 7 Pick. (Mass.) 18.

69. *Babbitt v. Savoy*, 3 Cush. (Mass.) 530.

70. *State ex rel. v. St. Louis*, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

71. *Fuller v. Groton*, 11 Gray. (Mass.) 340.

72. **When city may indemnify its officers—illustrations.** One "A" offered a bid to the board of education of a school district for furnishing stationery for the district. The board refused to entertain the

bid on the ground that "A" had at some time before dealt dishonestly with the district, and "A" sued the members of the board for injury to his business reputation. Held, that the district had no interest in the matter, and that it could not use its money in the defense of the suit. *Hotchkiss v. Plunkett*, 60 Conn. 230, 22 Atl. 535.

May reimburse an officer for attorney fees and other expenses incurred by him in defending an action for false imprisonment; the officer having acted in good faith in the exercise of his official duties. *Moorhead v. Murphy*, 94 Minn. 123, 102 N. W. 219, 68 L.

“The true test in all such cases is, did the act done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights or property,

R. A. 400, 110 Am. St. Rep. 345; Roper v. Laurinburg, 90 N. C. 427; Amer. and Eng. Corp. Cas. 130.

Where *quo warranto* was brought against an officer to oust him, which was dismissed on trial on the merits, the municipal corporation may pay the officer's attorney fees and expenses in defending his right to the office. McCredie v. Buffalo, 2 How. Pr. (N. S.) 336.

See, also, Kane v. McClellan, 110 N. Y. App. Div. 44, 96 N. Y. S. 806.

A road superintendent who advanced his private funds for improving the highways of his township, may recover the same so advanced by him which was necessary to put the highway in good ordinary repair. Clark Civil Twp. v. Brookshire, 114 Ind. 437, 16 N. E. 132.

An officer may recover expenses incurred by him in attempting to find in another state a fugitive from justice. Moon v. Butler County, 30 Kan. 458.

In the arrest and prosecution of public offenders. State v. Board of Freeholders, 37 N. J. L. 254.

An officer so expending his money may bring an action against the municipality to recover the same. Powell v. Newburgh, 19 Johns. (N. Y.) 284. The above was a case in which the trustees of a village were sued for an act

done by them, *virtute officii*, in the faithful discharge of their duty, and they were allowed to recover “for everything reasonably and necessarily disbursed in and about their defense.”

This rule is grounded on “agency,” on the theory that damages incurred by an agent in the course of the principal's affairs, or in consequence of such management, are to be borne by the principal. That where an agent acting faithfully, without fault, in the proper service of the principal, is subjected to expense, he ought to be reimbursed. “If sued on a contract made in the course of his agency, pursuant to his authority, though the suit be without cause, and then eventually succeeds, the law implies that the principal will indemnify him, and refund the expenses; for this he can maintain an action of *indebitatus assumpsit*; and the proof of these facts will be sufficient to warrant the jury to find the promise.”

“These principles are precisely applicable to this case; the plaintiffs were sued for an act done by them as the agents and trustees of the corporation, in the course of their agency, and pursuant to authority. They acted faithfully and without fault and are entitled to recover.” Powell v. Newburgh, 19 Johns. (N. Y.) 284.



or the right or property of the citizens which the officer was charged with a duty to protect or defend?"<sup>73</sup>

"In order to justify the expenditure of money by a municipal corporation in the indemnity of one or any of its officers for a loss incurred in the discharge of their official duty, three things must appear. *First*, the officer must have been acting in a matter in which the corporation had an interest. *Second*, he must have been acting in discharge of a duty imposed or authorized by law. And *third*, he must have acted in good faith."<sup>74</sup>

But municipal officials who have been adjudged guilty of contempt of court in violating a court order, cannot be said to be acting in good faith nor in the *bona fide* discharge of their duties. They are not entitled to indemnity from the municipal corporation for expenses incurred in their defense of the contempt proceedings.<sup>75</sup>

## 9. SALARIES AND COMPENSATION, FEES AND COMMISSIONS.

### § 515. Express legal provision is necessary to entitle an officer to salary or compensation.

The rule usually enforced by the courts is that unless the law provides a salary or compensation to the public officer none can be recovered. This wise rule is of

73. *State ex rel. v. St. Louis*, 174 Mo. 125, 133, 73 S. W. 623, 61 L. R. A. 593.

Officer may be reimbursed. "It would be beyond all bounds to say that in the case of an officer of a town, who errs as to his duty and commits an act not only unauthorized but unlawful, whereby another suffers injury and damage, a legal obligation arises on the part of the town to reimburse such officer for the costs, expenses and damage imposed upon him in con-

sequence of his wrong so done.

\* \* \* There is a wide difference between an exercise of discretionary power to thus favor an officer and a fixed obligation which may be enforced by such officer in an action at law." *Gormly v. Mt. Vernon*, 134 Iowa 394, 397, 108 N. W. 465.

74. *Hotchkiss v. Plunkett*, 60 Conn. 230, 233-234, 22 Atl. 535.

75. *West v. Utica*, 71 Hun (N. Y.) 540, 24 N. Y. S. 1075.

general application,<sup>76</sup> is steadily enforced by the courts, and is fully illustrated and explained in detail by the cases in the notes.<sup>77</sup>

76. *California*. *Lewis v. Widher*, 99 Cal. 412, 33 Pac. 1128.

*Colorado*. *Locke v. Central*, 4 Colo. 65, 34 Am. Rep. 66.

*Florida*. *Jacksonville v. Aetna Steam Fire Engine Co.*, 20 Fla. 100.

*Illinois*. *Cook v. Marseilles*, 139 Ill. App. 536, 538.

*Kentucky*. *Louisville v. Baird*, 15 B. Mon. (Ky.) 246.

*Maine*. *White v. Levant*, 78 Me. 568, 569, 7 Atl. 539.

*New Jersey*. *Tice v. New Brunswick*, 73 N. J. L. 615, 64 Atl. 108.

*Ohio*. *Walker v. Dillonvale*, 30 Ohio Cir. Ct. 623, 625.

*Pennsylvania*. *Devers v. York City*, 150 Pa. St. 208, 24 Atl. 668.

*Vermont*. *Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 392; *Langdon v. Castleton*, 30 Vt. 285.

*Washington*. *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499.

*Wisconsin*. *McCumber v. Waukesha Co.*, 91 Wis. 442, 65 N. W. 51; *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999.

*United States*. *Romero v. United States*, 24 Ct. of Cl. 331, 5 L. R. A. 69; *Kinney v. United States*, 60 Fed. 883.

77. **Law Must Provide Compensation.** "If an office unprovided with compensation is accepted, the incumbent has no legal claim for compensation." *Stephens v. Oldtown*, 102 Me. 21, 23, 65 Atl. 115, 117. See *Prince v. Fresno*, 88 Cal. 407, 26 Pac. 606.

If no salary is attached to the

office of mayor, an incumbent of such office is not entitled to fees for services as justice of the peace. *Howland v. Wright Co.*, 82 Iowa 164, 47 N. W. 1086.

Respecting town officers it was early held in Vermont that "if no law of the state fixed their compensation or pay, their services must be gratuitous." *Boyden v. Brookline*, 8 Vt. 284.

Town officers can recover only such sums as are fixed by law. *Barnes v. Bakersfield*, 57 Vt. 375; *McFarland v. Gordon*, 70 Vt. 455, 41 Atl. 507.

No claim for personal services as a town officer shall be allowed except when compensation is fixed by law or by vote of the town. Vt. Stat. (1894) 3060.

Compensation depends upon local law, *McGough v. New York*, 82 N. Y. S. 117, 83 App. Div. 322.

The mayor of a municipality has authority to collect fees, only where the same are expressly provided for by statute. *Cambridge v. Smallwood*, 27 Ohio Cir. Ct. 302.

An ordinance fixing the salary of the mayor and also providing that he shall collect fees for violation of penal ordinances, does not authorize the mayor to retain such fees as were collected in addition to his salary. *Cambridge v. Smallwood*, 27 Ohio Cir. Ct. 302.

One claiming greater salary than that which he has been receiving must point to the provision of the law with certainty

The right of a public officer to the salary of his office is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actually rendered.<sup>78</sup> Hence, acceptance of the office and the performance of the duties attached thereto will not create a liability on the part of the public or municipal corporation. In such case the legal presumption is that the officer intended to render gratuitous service, or as sometimes expressed, the mere performance of the duty relating to the office will not raise the presumption that compensation should be given therefor.<sup>79</sup>

which beyond doubt authorizes it. *State v. Britten*, 52 La. Ann. 94, 26 So. 753.

The amount of compensation usually depends upon the law in force at the time the services were rendered, and not the law at the time of his appointment. *People v. Ahearn*, 110 N. Y. S. 306, 125 App. Div. 795.

78. *California*. *People v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193.

*Colorado*. *Durnago v. Hampson*, 29 Colo. 77, 66 Pac. 883; *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693.

*Indiana*. *Indianapolis v. Martin*, Ind. App. (1909), 89 N. E. 599.

*Maine*. *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280.

*Massachusetts*. *Cook v. Springfield*, 184 Mass. 247, 68 N. E. 201.

*Minnesota*. *Larsen v. St. Paul*, 83 Minn. 473, 86 N. W. 459.

*Missouri*. *Givens v. Daviess County*, 107 Mo. 603, 608, 609, 17 S. W. 998; *State ex rel. v. Walbridge*, 153 Mo. 194, 203, 54 S. W. 447; *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159; *Basse v. St.*  
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*Louis*, 213 Mo. 401, 111 S. W. 1165; *Butterfield v. St. Louis*, 213 Mo. 402, 111 S. W. 1165; *Williams v. St. Louis*, 213 Mo. 403, 111 S. W. 1165; *State v. Brown*, 146 Mo. 401, 47 S. W. 504; *Gammon v. Lafayette County*, 76 Mo. 675; *State v. Carr*, 3 Mo. App. 6.

*New York*. *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 538, 55 Am. Rep. 835, 7 N. E. 787; *People v. Brennan*, 30 How. Pr. (N. Y.) 417; *Grieb v. Syracuse*, 87 N. Y. S. 1083, 1085, 94 App. Div. 133, 135.

*North Carolina*. *Hoke v. Henderson*, 4 Dev. (N. C.) 1.

*Tennessee*. *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499.

79. *Alabama*. *State v. Brewer*, 59 Ala. 130.

*Kentucky*. *Wortham v. Grayson Co.*, 13 Bush. (Ky.) 53.

*Illinois*. *Decatur v. Vermillion*, 77 Ill. 315.

*Iowa*. *Upton v. Clinton County*, 52 Iowa 311, 3 N. W. 81; *Howland v. Wright County*, 82 Iowa 164, 47 N. W. 1086.

*Maine*. *Goud v. Portland*, 96 Me. 125, 51 Atl. 820; *Talbot v. East Machias*, 76 Me. 415.

*Massachusetts*. *Walker v. Cook*,

In brief, the prevailing rule may be stated that, unless under exceptional circumstances, no implied promise or liability to pay officers will arise.<sup>80</sup> One accepting a

129 Mass. 577; *Sikes v. Hatfield*, 13 Gray (79 Mass.) 347.

*Michigan.* *Perry v. Cheboygan*, 55 Mich. 250, 21 N. W. 333.

*New York.* *Haswell v. New York*, 81 N. Y. 255, 9 Daly (N. Y.) 1.

*Oklahoma.* *Blackburn v. Oklahoma*, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708.

*Wisconsin.* *McCumber v. Waukesha Co.*, 91 Wis. 442, 65 N. E. 51.

**Mere Performance of Duty Does Not Authorize Salary.** A private clerk to a coroner, though he was legally appointed and performed the services attached to the office cannot recover compensation from the city, where, at the time, no salary had been legally attached to the position. *O'Connor v. New York*, 95 N. Y. S. 504, 48 Misc. Rep. 407; *Munch v. New York*, 47 Misc. Rep. 128.

An attorney appointed by the court to defend pauper criminals, where the statute enjoins the duty on the court to appoint and the attorney, in such cases, to defend, but provides no compensation, can recover none, notwithstanding the performance of the services. *Posey v. Mobile County*, 50 Ala. 6.

One who is neither a *de jure* or a *de facto* officer cannot be entitled to the salary of the office. *Hampton v. Jones*, 105 Va. 306, 54 S. E. 16.

**Voluntary Service.** "No obligation to pay members of a volunteer association for the extinguishment of fires in a municipal corporation arises or is implied

from the rendition of such service. The law of their organization, the ordinances of the city, and the constitution of the company, as shown by this record is that their service is voluntary and without pay, and if they claim compensation the burden of proof is clearly upon them to satisfactorily show a contract to that effect." *Jacksonville v. Aetna Steam Fire Engine Co.*, 20 Fla. 100.

**Additional Duties.** An employee of a municipal corporation at a regular salary is bound to perform the duties of his office for the compensation fixed, even though additional duties are imposed upon him by statute or ordinance subsequently to his employment. *May v. Chicago*, 222 Ill. 595, 78 N. E. 912, affirming 124 Ill. App. 527; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406.

80. *California.* *Woods v. Potter*, 8 Cal. App. 41, 95 Pac. 1125.

*Louisiana.* *Bosworth v. New Orleans*, 26 La. Ann. 494.

*Missouri.* *Riley v. Kansas City*, 31 Mo. App. 439; *Garnier v. St. Louis*, 37 Mo. 554.

*Texas.* *Brownwood v. Farmer*, 3 Tex. Civ. App. 420.

**Contra.** The appointment of a policeman by a police and fire commission having control of the police and fire departments, followed by its acceptance of the services of the appointee creates an implied contract on the part of the city to pay him a salary. *San Antonio v. Beck*, Tex. Civ. App. (1907), 101 S. W. 263.

public office or position is presumed to do so with full knowledge of the law as to salary, compensation, or fees, and all limitations prescribed must be strictly observed.<sup>81</sup> The law which is claimed to confer such right must be strictly construed against the officer and in favor of the public.<sup>82</sup>

Accordingly the compensation must be fixed as the law prescribes, and when not so regulated none can be paid.<sup>83</sup> This is the general rule, however, in the circumstances of particular cases recovery has been sanctioned where the services were discharged in good faith, and especially in case of emergency.<sup>84</sup>

81. *Baker v. Utica*, 19 N. Y. 326.

82. *State ex rel. v. Adams*, 172 Mo. 1, 72 S. W. 655; *Jackson County v. Stone*, 168 Mo. 577, 68 S. W. 926; *State ex rel. v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *State ex rel. v. Brown*, 146 Mo. 401, 47 S. W. 504; *State ex rel. v. Wofford*, 116 Mo. 220, 22 S. W. 486; *Givens v. Daviess County*, 107 Mo. 603, 17 S. W. 998; *Gammon v. Lafayette County*, 76 Mo. 675.

*United States. United States v. Claugh*, 55 Fed. 373, 5 C. C. A. 140.

83. *McEwan v. West Hoboken*, 58 N. J. L. 512, 34 Atl. 130.

84. *Recovery on quantum meruit*. In one case the charter provided for a city solicitor and prescribed that he should perform such duties as should be defined by ordinance. There was no ordinance prescribing the duties or fixing the compensation of the city solicitor. In an appeal from the action of the city council while acting as a board of equalization (which the court found was a corporate function) the city

solicitor appeared in the appellate court and defended. Held, the city solicitor could recover from the city what his services were reasonably worth, notwithstanding he did not show special employment.

The court said (p. 439): "It seems to us that emergencies may often arise, great or small, where the interests of the city would suffer if the city solicitor did not act promptly and on his own motion, and in the absence of an ordinance where none is adopted. If in such case he acts with discretion and renders the city a service, we do not think he should be regarded as acting without authority and therefore without compensation; nor do we think such rule inconsistent with the ultimate right of the city council to determine what the city solicitor shall do and shall not do. We think that a city solicitor may properly assume, if not otherwise directed that it is his duty to appear for the city in the appellate court in all cases where the city is appellee. As the plaintiff appeared in such a case

### § 516. Power to fix salaries, compensation, etc.

Ordinarily the amount of salary or compensation for performing the duties of a public office or place is fixed by charter, or legislative act applicable thereto, or ordinance.<sup>85</sup> Sometimes the power to establish is vested in the council or governing legislative body, and sometimes in a designated officer or department. The exercise of the power must be as specified, in substantial compliance with the controlling legal provision.<sup>86</sup> If the salary is fixed by the proper authority and in the manner pre-

we cannot regard his services as rendered without authorization. But it is said he cannot recover because the council has not fixed the compensation. The right to fix the compensation does not include the right to withhold it. If it was by law the plaintiff's duty to render the service which he did, the law will allow him therefor what the service was reasonably worth." *Kinnie v. Waverly*, 42 Iowa 437, 439, 440.

Held, city physician duly elected by council could recover of city what services were worth (on *quantum meruit*). *Tucker v. Virginia City*, 4 Nev. 20.

Where no salary is provided and the officer performs the duties of the office, a reasonable sum may be fixed, when. *Bogart v. Seymour Tp.*, 10 Ont. 322.

City held responsible to pay for services rendered by officer during the existence of a provisional government. *Boyle v. Newbern*, 64 N. C. 664.

The right of a police officer to compensation does not rest upon

contract but is incident to the right to hold office, and unless compensation is allowed by law he cannot recover on a *quantum meruit* for services rendered. *McGillic v. Corby*, 37 Mont. 249, 95 Pac. 1063.

85. When charter or state law control. The provisions of the charter respecting compensations are usually held to prevail over provisions of the general statute. *Lacey v. Waples*, 28 La. Ann. 158; *Stevens v. Minneapolis*, 29 Minn. 219, 12 N. W. 533.

When charter provisions as to salary will prevail over state statutes. See *Hartman v. New York*, 51 How. Pr. (N. Y.) 351.

When charter prevails over statute, see ch. 21 *post*, Amendment and Repeal of Municipal Ordinances.

86. *Fountain v. Jackson City*, 50 Mich. 15, 14, N. W. 680; *Edgcomb v. Lewiston*, 71 Me. 343; *Calis v. Whidden*, 64 Me. 249; *Taylor v. New York*, 67 N. Y.

87.

scribed the general rule is that courts will not interfere. The judicial decisions in the note amply illustrate this rule.<sup>87</sup>

87. *Newport v. Berry*, 80 Ky. 354; *Wesch v. Detroit*, 107 Mich. 149, 64 N. W. 1051; *People v. Haverstraw*, 23 N. Y. App. Div. 231, 48 N. Y. S. 740.

**Establishing salaries — Illustrated.** Where the city council is required by statute to fix a reasonable compensation for officers of a city, the court will not interfere in the matter of fixing the salary of a health officer, unless such salary is unreasonably small. *Graves v. Paducah*, 28 Ky. L. Rep. 576, 89 S. W. 708.

**Reasonableness.** *People v. Monroe*, 83 N. Y. S. 382, 85 App. Div. 542.

Under a charter authorizing a board of police commissioners to appoint special policemen who shall hold office without compensation "except as specially provided by the board;" one accepting appointment as special policeman is subject to a custom of the board to pay him the same salary paid to regular policemen, where no other compensation was fixed by such board. *People v. Robbins*, 95 N. Y. S. 901, 109 App. Div. 387.

The New Jersey statutes authorize an agreement requiring any city officer to perform his duties for a compensation commensurate with and limited to the value of the services that may be rendered, and without any stipulated salary. *Tice v. New Brunswick*, 73 N. J. L. 615, 64 Atl. 108.

**Authority to fix salaries is generally confined to municipal**

officers, and does not extend to fixing the compensation of state officers, as e. g., court clerks. *Whitmore v. New York*, 67 N. Y. 21.

Where a coroner without authority purported to fix the salary of his private clerk, such clerk cannot recover compensation for the services rendered by him. *Munch v. New York*, 93 N. Y. S. 509, 47 Misc. Rep. 128.

Board of excise commissioners held to have no power to fix compensation of city clerk for acting as clerk of board as law prescribed. *State v. Cherry*, 53 N. J. L. 173, 20 Atl. 825.

The power "to name and settle" an officer granted by the constitution includes power to fix his compensation. *Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100.

The power of a general court to fix the compensation of police officers may be delegated to a police commission created by it. *Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100.

Where a board of health was authorized by statute to fix the compensation of a physician employed by it, the common council had no authority, when a claim therefor was presented to it for allowance, to reduce the amount so fixed. *Pease v. Common Council*, 126 Mich. 436, 85 N. W. 1082.

Authority to fix in particular case. *People v. Scannell*, 171 N. Y. 690, 64 N. E. 1124, affirming 75 N. Y. S. 904.

Where a public office is created, and the compensation to be paid for services rendered by the incumbent thereof is to be fixed by a public body, upon failure of such body

**Method of establishing salaries.** A statute fixing ten dollars per day as the compensation of the engineer of a sanitary district excludes the idea that he should receive more. *Burke v. Chicago Sanitary District, etc.*, 92 Ill. App. 333.

Where a salary is fixed at a certain percentage of the amount disbursed by the city treasurer, in an action to recover it evidence as to what was a reasonable compensation is inadmissible. *Grenada v. Wood*, 81 Miss. 308, 33 So. 173.

A town vote determining what would be a reasonable compensation for certain officers of fire department, constitutes an implied contract to pay, when. *Parks v. Waltham*, 120 Mass. 161.

Where a statute providing that salaries of employees in the department of public works shall be fixed by the commissioner with the concurrence of the common council, does not require any particular method of fixing such salaries, the action of the commissioner in fixing same must be called to the attention of the common council for its concurrence. *In re Babcock*, 101 N. Y. S. 90, 115 App. Div. 191.

A rule of classification of the civil service which grades positions in the competitive class according to the fixed limit of compensation is not a rule fixing the salary of such positions or a declaration that every person holding same shall receive such com-

pensation. *Powell v. New York*, 72 N. Y. S. 990, 65 App. Div. 421.

Where the charter requires compensation of members of the council to be fixed by ordinance in the absence of such ordinance provision a member is not entitled to compensation. *McEwan v. West Hoboken*, 58 N. J. L. 512, 34 Atl. 130.

A charter provision that all municipal officers shall receive such salaries as may be fixed by ordinance but in no case to exceed specified amounts, does not fix salaries but merely limits the amounts. *Taylor v. Tacoma*, 8 Wash. 174, 35 Pac. 584.

A mere appropriation of gross sums for the expenses of a department based on estimates specifying salaries of particular officers cannot be construed as fixing salaries. *Cox v. New York*, 103 N. Y. 519, 9 N. E. 48.

A general law granting certain cities power to fix the compensation of officers by ordinance and limiting the salary to the amount so fixed, which should be in full compensation for all services connected with official duties, is not self-executing, and hence, is of no effect until the passage of an ordinance thereunder. *State v. Olinger*, 109 Iowa 669, 80 N. W. 1060.

But where the statute provides that members of a city council may receive two dollars for each meeting, no ordinance is necessary therefor. *Walker et al. v. Dillonvale*, 30 Ohio Cir. Ct. 623, 92 N. E. 220, 223.



to act therein, it may be compelled to do so by *mandamus*.<sup>88</sup> But in such case the court will not fix the compensation.<sup>89</sup>

Usually the council or governing legislative body is given power to fix salaries of municipal officers, and employees which is done ordinarily by ordinance, a legislative act, and not by mere resolution.<sup>90</sup> An ordinance

88. Where a petition for *mandamus* to compel the board of estimate of New York City to fix an officer's salary alleges that such salary was fixed by statute the petitioner is not entitled to the writ. *Hamburger v. Board of Estimate, etc.*, 96 N. Y. S. 130, 109 App. Div. 427.

89. *Cook v. Springfield*, 184 Mass. 247, 68 N. E. 201.

90. *Kentucky*. *Barrett v. Falmouth*, 109 Ky. 151, 22 Ky. Law Rep. 667, 58 S. W. 520; *Newport v. Berry*, 80 Ky. 354.

*Maryland*. *Brazil v. McBride*, 69 Md. 244.

*Massachusetts*. *Faulkner v. Sisson*, 183 Mass. 524, 67 N. E. 669.

*New Jersey*. *Rightmeier v. Camden*, 50 N. J. L. 43, 13 Atl. 30; *Stuhr v. Hoboken*, 47 N. J. L. 147.

*Pennsylvania*. *Smith v. Com.*, 41 Pa. St. 335.

*Texas*. *McFall v. Austin*, 1 White & W. Civ. Cas. Ct. of App. of Texas, § 450.

*Virginia*. *Kirkham v. Russell*, 76 Va. 956, 959.

*Washington*. *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

*Canada*. *In re Prince*, 25 Up. Can. Q. B. 175.

Salary established by council—illustrative Cases. But if not expressly so required, resolution

or vote will do. *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503.

See ch. 15 *post*.

Under a charter providing for the appointment of a city attorney, and that he shall receive such salary as shall be fixed by the council the council may fix such salary by resolution. *State v. Nichols*, 83 Minn. 3, 85 N. W. 717.

Permanent salaries of officers must be fixed by ordinance and not by resolution, not approved by mayor. *Central v. Sears*, 2 Colo. 588.

Sometimes the council cannot fix salaries of city engineer. *Rundlett v. St. Paul*, 64 Minn. 223, 66 N. W. 967.

Right to fix pay of policemen is sometimes vested in police commissioners and not in the council. *Flanagan v. Kansas City*, 69 Mo. 462.

If the law limits the salaries to specified sums, of course, such sums cannot be exceeded. The fees of no "executive" or "ministerial" officer of any municipality, "exclusive of salaries actually paid to necessary deputies" shall exceed \$10,000 per year. *Const. Mo.* 1875, art. IX, § 13.

The action of a city council in allowing from time to time as prescribed, bills of the superintendent of streets for services in

fixing salaries of employees is not in the nature of a contract between the municipal corporation and the employees.<sup>90a</sup>

Although the charter authorizes the council or legislative body to fix the salaries of all municipal officers, usually the members thereof cannot provide salaries for

the case of streets, does not fix any compensation for that office. *Wagoner v. Philadelphia*, 215 Pa. 379, 64 Atl. 557.

An ordinance fixing the compensation of a jailer at a less sum than that fixed by statute is invalid. *Paducah v. Evitts*, 27 Ky. L. Rep. 867, 86 S. W. 1123.

Where the council has the authority to acquire a waterworks system, it cannot, before the city has acquired any water system at all, enter into a contract with an engineer by which he is to have charge for an indefinite period of the additions to be made to the plant if purchased. *Witmer v. Jamestown*, 109 N. Y. S. 269, 125 App. Div. 43.

Where a charter required the council to fix the salaries of certain officers and employees not to exceed specified amounts, and the salary of "any other officer and agent" not to exceed \$1200, a contract by the council with an electrician for services in the city lighting system for eight months for \$1200 payable in eight equal monthly instalments is an evasion of the charter and is void. *Alden v. Campbell*, 30 Wash. 392, 70 Pac. 1094.

An ordinance providing that a

town marshal shall receive for his services a specified per cent of fines imposed, and another ordinance adopted at the same meeting repealing all former ordinances in conflict therewith, repeals an existing ordinance fixing the salary of such marshal at a certain amount per month. *Maxey v. Tompkinsville*, 25 Ky. L. Rep. 1448, 79 S. W. 214.

Board of aldermen may fix by ordinance fees for the city attorney on contingency they are collected from defendants in cases of violations of city ordinances. *Kemp v. Monett*, 95 Mo. App. 452, 69 S. W. 31.

In case an ordinance fixes a *per diem* wage for workmen, the city may discontinue the payment of a full day's wages for a half day's work. *Wagoner v. Philadelphia*, 215 Pa. 379, 64 Atl. 557.

Where the salaries have not been fixed and the charter is changed after the election of the officers the salaries of such officers may be fixed by ordinance under the amended charter. *State v. McDowell*, 19 Neb. 442, 27 N. W. 443; *Wheelock v. McDowell*, 20 Neb. 160.

90a. *Wagoner v. Philadelphia*, 215 Pa. 379, 64 Atl. 557.

themselves.<sup>91</sup> Aldermen may not fix their own compensation in Vermont, for "it is fundamental that a man shall not be a judge of his own case. It was early said that no man can serve two masters." Where the legislature intends to change the general rule so anciently declared by such high authority, "the power must be given in express terms."<sup>92</sup>

§ 517. Salary or compensation of de facto officers — defect in law or election or appointment.

Fatal defects in the election or appointment of the officer may deprive him of compensation.<sup>93</sup> It has been held that an officer cannot recover compensation for services rendered under a statute held unconstitutional.<sup>94</sup> So an officer ineligible cannot recover for services rendered.<sup>95</sup> It is sometimes held that mere irregularities in proceedings by which the officer was appointed will not deprive him of the salary belonging to the office where the duties appertaining thereto are performed in good faith.<sup>96</sup>

Generally an officer elected or appointed without authority cannot recover compensation. It has often

91. *New Jersey*. *Gregory v. Jersey City*, 34 N. J. L. 429.

*Pennsylvania*. In *re Dickson City*, 2 Lack. Leg. N. (Pa.) 133.

*Wisconsin*. *Gilbert Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999.

92. *McFarland v. Gordon*, 70 Vt. 455, 41 Atl. 507.

The commissioner of a school district cannot employ himself as a teacher to teach the district school, and cannot in such case recover upon a *quantum meruit*. *Scott v. School Dist.*, 67 Vt. 150.

93. *Rothrock v. School District*, 133 Pa. St. 487; *Phelan v. Granville*, 140 Mass. 386, 5 N. E.

269; *Commonwealth v. Allen*, 123 Mass. 308; *Yorks v. St. Paul*, 62 Minn. 250, 64 N. W. 565.

94. *Meagher v. County*, 5 Nev. 244; *Central v. Sears*, 2 Colo. 588; *Lancaster v. Fulton*, 24 W. N. C. 401; *Smith v. Commonwealth*, 41 Pa. St. 335.

95. A member of the board of health of a municipal corporation who is ineligible to the office of district physician cannot recover for services rendered in that capacity. *State v. Wichgar*, 27 Ohio Cir. Ct. 743.

96. *Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925.

been held that a *de facto* officer cannot recover the pay or salary appertaining to the office even though he performs its duties, for the general doctrine is that the salary follows the legal title to the office.<sup>97</sup> Thus where the law requires the appointment to be confirmed by the council, in the absence of such confirmation the one appointed is not entitled to salary although he performed the duties of the office.<sup>98</sup> But one who is a *de facto* officer of a *de facto* municipal corporation who continues to act after the organization of the *de jure* corporation may recover the salary during the time, where there was no corresponding *de jure* officer who performed the duties of the office.<sup>99</sup>

97. *California*. Shaw v. San Francisco, Cal. App. (1910), 110 Pac. 149.

*Connecticut*. State v. Carroll, 38 Conn. 471.

*Delaware*. Foster v. Wilmington, 8 Houst. (Del.) 415, 32 Atl. 348.

*Massachusetts*. Phelan v. Granville, 140 Mass. 386.

*Maine*. Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280.

*New York*. Bentley v. Phelps, 27 Barb. (N. Y.) 524; People v. Tierman, 30 Barb. (N. Y.) 193.

*Pennsylvania*. Riddle v. Bedford Co., 7 Serg. R. (Pa.) 386.

*United States*. Romero v. United States, 24 Ct. of Cl. 331, 5 L. R. A. 69.

Note 54 Am. Rep. 730.

The right to a salary must on principle depend upon the legal possession of the office. Samis v. King, 40 Conn. 298, 305.

*De facto* officer where the office was in dispute and had been abandoned is not entitled to a fee. Dickerson v. Butler, 27 Mo. App. 9.

Proof of appointment and proof that he is *de facto* officer are necessary to boiler inspector to recover fees appertaining to office. Home Ins. Co. v. Tierney, 47 Ill. App. 600.

98. Jones v. Easton, 4 Pa. Dist. Rep. 509.

Where a board of education had power to employ teachers only on the recommendation of the superintendent of instruction a re-employment of a teacher by such board without the recommendation of the superintendent is invalid and salary is not recoverable. Wetmore v. Board of Education, 86 Mo. App. 362.

99. Blackburn v. Oklahoma City, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708.

§ 518. Salary as between de jure and de facto officer.

It has often been adjudged that the payment of the salary belonging to the office to the *de facto* officer by legal authority prior to the settlement of the title to the office against him will deprive the *de jure* officer of the right to recover such salary from the public.<sup>1</sup> In such case, the prevailing rule is to give the *de jure* officer a right to recover from the *de facto* officer.<sup>2</sup> The theory

1. *Kansas*. Saline Co. Com'rs v. Anderson, 20 Kan. 298, 27 Am. Rep. 171.

*Kentucky*. Walters v. Paducah, (Ky. 1909), 123 S. W. 287.

*Louisiana*. Michel v. New Orleans, 32 La. Ann. 1094.

*Michigan*. Wayne Co. Auditor v. Benoit, 20 Mich. 176.

*Minnesota*. Parker v. Dakota Co., 4 Minn. 59 (Gil. 39).

*Missouri*. State v. Clark, 52 Mo. 508.

*Nebraska*. State ex rel. Greely County v. Milne, 36 Neb. 301, 19 L. R. A. 689, and note.

*New Jersey*. McDonald v. Newark, 58 N. J. L. 12, 32 Atl. 384.

*New York*. Martin v. New York, 81 N. Y. S. 412, 82 App. Div. 35, judgment affirmed in 68 N. E. 640; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Demarest v. New York, 147 N. Y. 203, 41 N. E. 405.

*Ohio*. Steubenville v. Culp, 38 Ohio St. 18, 43 Am. Rep. 417.

*Utah*. Kendall v. Raybould, 13 Utah 226, 44 Pac. 1034.

*Wisconsin*. Contrast, Kempster v. Milwaukee, 97 Wis. 343, 72 N. W. 743.

The officer entitled to the office cannot recover the salary until there has been a legal determina-

tion declaring his right to the office. He may then recover during the time that he was illegally prevented from filling the office, provided the same has not been paid to a *de facto* officer who performed the duties thereof. McManus v. Buffalo, 5 N. Y. S. 424.

An officer, the town scavenger, elected by the *de jure* town council and thereafter performed the duties required of him as such officer may recover the salary due him as such officer although prior payment thereof had been made to another, illegally elected to such office by a *de facto* town council and who performed duties relating to such office. Howard v. Port Royal, 85 S. C. 361, 67 S. E. 449.

2. *California*. People v. Smithe, 28 Cal. 21.

*Illinois*. Kreitz v. Behrensmeier, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59.

*Indiana*. Glasscock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299.

*Louisiana*. Michel v. New Orleans, 32 La. Ann. 1094; Pettit v. Rousseau, 15 La. Ann. 239.

*Michigan*. People v. Miller, 24 Mich. 458, 9 Am. Rep. 131.

*Missouri*. Hunter v. Chandler, 45 Mo. 452.

is that the law protects the municipal corporation from a second payment of compensation once paid to one who actually discharged the duties of an office with color of title. It is said that this rule applies whether payment is in the form of a salary or fees or whether the office held was by appointment or election.<sup>3</sup> However, the more reasonable rule has often been applied, namely, allowing the *de jure* officer the salary from the public fund, although it has been received by the *de facto* officer.<sup>4</sup>

If one has been legally adjudged the rightful officer, according to some decisions he may recover compensation of the city, though the city has after notice of the decision, made payment to the intruder.<sup>5</sup> So it has been ruled that a *de jure* officer illegally removed may recover his salary from the city for the period of removal although the salary was paid to the *de facto* officer who

*New York.* Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; Kessel v. Leiser, 102 N. Y. 114, 55 Am. Rep. 769; Nichols v. McLean, 101 N. Y. 526, 54 Am. Rep. 730; Sutcliffe v. New York, 117 N. Y. S. 813, 132 App. Div. 831.

*New Jersey.* *Contra*, Stuhr v. Curran, 44 N. J. L. 181, 43 Am. Rep. 353.

*West Virginia.* Bier v. Gorell, 30 W. Va. 95, 8 Am. St. 17.

*United States.* United States v. Addison, 6 Wall. (U. S.) 291.

*England.* Vaux v. Jefferson, 2 Dyer 114; Arris v. Stukeley, 2 Mod. 260; Lee v. Drake, 2 Salk 468; Webb's Case, 8 Rep. 45.

A member of the house of delegates of a city who was not a *de jure* officer is not entitled to recover the salary of the office. Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082.

3. McVeany v. New York, 80 N. Y. 185, 36 Am. Rep. 600.

4. *California.* Ward v. Marshall, 96 Cal. 153, 30 Pac. 113.

*Indiana.* State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177.

*Maine.* Andrews v. Portland, 79 Me. 485, 10 Atl. 458, 10 Am. St. Rep. 280.

*New York.* People v. Brennan, 30 How. Pr. (N. Y.) 417, reversing 1 Abb. Pr. (N. S.) 184.

*Tennessee.* Memphis v. Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750.

*Utah.* Kendall v. Raybould, 13 Utah 26, 44 Pac. 1034.

*Wisconsin.* Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743.

5. McVeany v. New York, 80 N. Y. 185, 36 Am. Rep. 600, reversing 1 Hun (N. Y.) 35, 3 Thomps. & C. 131.

was appointed and served.<sup>6</sup> But where one is declared elected and is afterwards ousted by legal proceedings by the opposing candidate at the election, some cases hold that salary paid the former cannot be recovered by the latter from the city.<sup>7</sup>

**§ 519. Salary or compensation where the office or position is legally abolished.**

Offices and positions may be abolished legally by the proper authorities, and when this occurs the salary or compensation appertaining thereto also ceases to exist. If the office has been duly abolished the officer cannot receive a salary for the unexpired term, in the absence of legal provisions therefor.<sup>8</sup> So unless the law forbids, the compensation of an officer may be abolished.<sup>9</sup>

6. *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *State ex rel. v. Carr*, 3 Mo. App. 6.

7. *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1.

Where there is a *de facto* officer holding the office in contest, the *de jure* officer must first obtain the office by direct procedure against the power which wrongfully removed him and he cannot recover from the state or municipality the salary drawn by the *de facto* officer pending the litigation. *Wagner v. Louisville*, (Ky. 1909), 117 S. W. 283.

See § 520 *post*.

8. *Butcher v. Camden*, 29 N. J. L. 478; *Halsey v. Gaimes*, 70 Tenn. (2 Lea) 316.

**Abolition of position.** *Kastor v. New York*, 80 N. Y. S. 952, 39 Misc. Rep. 709.

In one case officers of a board of public works were allowed sal-

aries until the question of abolition of their offices were determined by the supreme court, where the lower court rendered judgments in their favor which were not superseded. *Board of Frankfort v. Brawner*, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497.

Where a commission was created by statute to improve streets and construct public sewers in a city and was invested with capacity to sue and be sued, thus acquiring a *quasi-judicial* existence, its abolition does not make the city liable in an action at law for the salaries of the commissioners. *Oram v. New Brunswick*, 66 N. J. L. 632, 50 Atl. 457.

A subordinate cannot recover when his principal is suspended from office. *In re Young*, 90 N. Y. S. 74, 44 Misc. Rep. 521.

9. *Newport v. Berry*, 80 Ky. 354; *Gurley v. New Orleans*, 41 La. Ann. 75, 5 So. 659.

If the salary is prescribed by charter or legislative act it cannot be abolished by ordinance, since an ordinance cannot in any event supersede a charter provision and usually an ordinance will not supersede a state statute.<sup>10</sup> The salary attached to an office created by ordinance becomes extinct when the office is abolished by charter.<sup>11</sup> And where one performs the duties of an office after it is abolished by charter, and received a monthly salary less than that provided by ordinance he cannot recover the difference, though the services were accepted by the city.<sup>12</sup>

### § 520. Salary or compensation in case of removal or suspension from office.

Where an officer elected or appointed for a definite term is illegally suspended or removed the general rule is that he may recover the salary or compensation of the office for the term intervening between the wrongful suspension or removal and the expiration of his term, although he discharges no duties appertaining to the office; however, the rule is otherwise where the officer is legally suspended or removed, and the prevailing judicial view is that, the fact that the executive officer or tribunal acting may have acted judicially in the suspension or removal will not prevent recovery.<sup>13</sup>

10. *State v. Nashville*, 83 Tenn. 697, 54 Am. Rep. 427; *San Antonio v. Michlejohn*, 89 Tex. 79, 33 S. W. 735.

11. *Cutshaw v. Denver*, 19 Colo. App. 341, 75 Pac. 22.

12. *Cutshaw v. Denver*, 19 Colo. App. 341, 75 Pac. 22.

13. *Georgia*. *Parks v. Atlanta*, 76 Ga. 828; *Shaw v. Mayor*, 19 Ga. 468.

*Illinois*. *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410, affirming 91 Ill. App. 324.

*Louisiana*. *Mandell v. New Orleans*, 21 La. Ann. 9; *Hire v. New Orleans*, 21 La. Ann. 428.

*Maryland*. *Baltimore v. O'Neill*, 62 Md. 336.

*Michigan*. *Stadler v. Detroit*, 13 Mich. 346; *Newberry v. Smith*, 157 Mich. 181, 183, 121 N. W. 746, 16 Det. Leg. N. 315.

*Missouri*. *State ex rel. v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *Westberg v. Kansas City*, 64 Mo. 493.

*New York*. *People v. Cook*, 102 N. Y. S. 1087, 117 App. Div. 788; *Fitzsimmons v. Brook*, 102 N. Y. 536, 55 Am. Rep. 835, 7 N. E. 787; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347; *Alsberge v. New York*, 78 N. Y. S.



Whether an officer illegally removed, or an employee wrongfully discharged can recover the salary or compensation appertaining to the office or place, will depend on the circumstances of the particular case.<sup>14</sup> As a condi-

145, 75 App. Div. 360; *Morley v. New York*, 58 Hun (N. Y.) 610, 12 N. Y. S. 609; *McVay v. New York*, 116 N. Y. S. 908, 910.

*Pennsylvania*. *Jenkins v. Scranton*, 205 Pa. 598, 55 Atl. 788.

*Texas*. *Cawthon v. Houston*, 31 Tex. Civ. App. 1, 71 S. W. 329; *San Antonio v. Beck*, Tex. Civ. App., 101 S. W. 263; *San Antonio v. Tobin*, 100 Tex. 589, 102 S. W. 403.

14. **Salary in case of suspension or removal—illustrative cases.** "No officer shall receive any salary during the time he is suspended by the mayor, nor until the council shall decide the case." *St. Louis Mun. Code* (1901), § 1606; *Lewis v. St. Louis*, 12 Mo. App. 570.

If an officer has no franchise in his office (that is to say, if the nature of his office is a mere employment) he may be removed without notice, subject to the liability of the corporation for damages for breach of contract, if by such removal a contract is violated. *State ex rel. McMahon v. City Council, etc.*, 107 La. 632, 32 So. 22.

An attempted removal of an officer appointed for a term, without the charges and proceedings prescribed by law, does not deprive such officer of his right to salary for the remainder of his term. *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159.

A fire commissioner having authority to discharge a fireman at

pleasure and to re-employ him may stop his pay for a stated period as a penalty for misconduct. And such stoppage of pay is not limited to the amount which the town is authorized to impose as a fine. *Norton v. Inhabitants of Brookline*, 181 Mass. 360, 63 N. E. 930.

Assumption of authority by an officer to remove another officer in pursuance of a precedent set at the instance of the latter in a former removal, will not furnish ground for an action for damages. *De Armas v. Bell*, 109 La. 181, 33 So. 188.

A teacher employed for an indefinite term subject to removal for cause, who is removed without cause is entitled to her salary. *Boyer v. Board of Education*, 89 N. Y. S. 737, 44 Misc. Rep. 10.

Under a statute providing that officers and employees whose offices or positions are abolished shall be deemed suspended without pay, an employee who was wrongfully discharged and the position subsequently abolished cannot recover salary for a period subsequently to the abolishment. *Kastor v. New York*, 80 N. Y. S. 952, 39 Misc. Rep. 709.

Where a captain was illegally reduced to patrolman his administratrix can recover the difference in salary less his dues to the pension fund. *Buschmann v. New*

tion to recover sometimes he must offer to perform the duties belonging to the office or tender his service, or stand ready and willing to do so, if required.<sup>15</sup> But it has been ruled that if a municipal corporation ratifies an unlawful removal or discharge the officer is not required to notify the corporate authorities of such action and express willingness to perform the duties of the office, or demand the salary relating thereto, in order to entitle him to recover it.<sup>16</sup> And it has also been held that the acceptance by an officer wrongfully removed of his salary up to the time of his removal, and the fact that he

York, 72 N. Y. S. 127, 35 Misc. Rep. 607.

Where a board of safety had no power to cut down the number of the police force, nor to supend policemen without charges and a hearing, its order to the chief of police to "lay off" the entire force for four days because of an inadequate appropriation was void and the police officers are entitled to their salaries for the time they were laid off. *Gorley v. Louisville*, 23 Ky. L. Rep. 1782, 65 S. W. 844.

**Veterans.** Laws providing for compensation for veterans who are unlawfully removed are not unconstitutional in New York. *People v. Grout*, 90 N. Y. S. 122, 44 Misc. Rep. 526.

A veteran laborer of a city may, on being wrongfully discharged, maintain an action against the city for work done subsequent to his discharge. *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481.

And he is not prevented from so doing by statute providing for a penalty for failing to comply with the civil service statutes. *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481.

A civil service employee tried and discharged by a civil service tribunal cannot recover any salary for a period subsequent to such discharge where such tribunal had jurisdiction, although errors occurred in the proceedings. *Chicago v. Campbell*, 118 Ill. App. 129.

Where a civil service employee was suspended from the head of a department under the honest belief that such reduction was in the best interests of the city, he was not unlawfully discharged and cannot recover salary for the term he was unemployed. *Shane v. New York*, 120 N. Y. S. 428, 135 App. Div. 218.

15. *Gregory v. New York*, 40 N. Y. 273, 3 L. R. A. 854.

A municipal employee unlawfully discharged whose position is not filled by another, and who stands ready and willing to render service is entitled to the salary of the position. *Holt v. New York*, 72 N. Y. S. 201, 35 Misc. Rep. 642; *People v. Dalton*, 72 N. Y. S. 198.

16. *Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925.

obtained other employment thereafter will not prevent a recovery by him of the salary accruing to him during his wrongful removal.<sup>17</sup> In brief, an officer who is illegally removed without cause is entitled to his salary though he performed no duties of the office and engaged in other pursuits.<sup>18</sup>

The officer wrongfully suspended or discharged may by words or conduct acquiesce in such action, and thus deprive himself of the right to recover the salary or compensation of the office, this on the ground of the doctrine of waiver and estoppel which is applicable in cases of this character when warranted by the surrounding circumstances.<sup>19</sup>

17. *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159.

Where one is prevented from performing the duties of the office by illegal removal the city cannot deduct the amount earned by the officer by his personal labor. *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458.

18. *Houston v. Estes*, 35 Tex. Civ. App. 99, 79 S. W. 848; *Houston v. Clark*, 36 Civ. App. 43, 80 S. W. 1198; *Houston v. Smith*, 36 Tex. Civ. App. 43, 80 S. W. 1198.

A veteran civil service employee under New York civil service laws upon being unlawfully removed can recover salary from the time of his removal until his reinstatement, subject to reductions for salary in other employment but such employment would not affect his right to reinstatement. *People v. Brainn*, 126 N. Y. 47, 51, 141 App. Div. 295.

A veteran civil service employee who was wrongfully discharged, and made no effort thereafter to get other employment is entitled to recover only nominal damages for the unexpired term. *Ransom*  
2 McQ—15

*v. Boston*, 196 Mass. 248, 81 N. E. 998.

Where a civil service employee of New York City who is not a public officer, is illegally removed and thereafter reinstated he is entitled to his salary while so removed subject to an offset by the city of amounts earned by him during said time in other employment. *Sutcliffe v. New York*, 117 N. Y. S. 813, 815, 132 App. Div. 213.

19. **Acquiescence and estoppel.** An appointive officer unlawfully dismissed and prevented from rendering service who has made no complaint to the mayor or city council, and has not attempted to secure reinstatement, but has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he had performed no service. *Byrnes v. St. Paul*, 78 Minn. 205, 80 N. W. 959, 79 Am. St. Rep. 384; *Hagan v. Brooklyn*, 126 N. Y. 643; *Phillips v. Boston*, 150 Mass. 491; *Bernard v. Hoboken*, 27 N. J. L. 413.

Under particular circumstances the rule is sometimes applied that, without reinstatement or an adjudication in an appropriate legal proceeding in his favor and establishing his rights thereto a public officer who has been wrongfully suspended or removed cannot recover the salary of the office or position.<sup>20</sup> And some cases declare

If a policeman who had been removed without a hearing, as required by law, removed from the city and at no time demanded his salary or sought to compel his reinstatement, he will be held to have abandoned the office and hence is not entitled to recover salary from the city. *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128.

In event a policeman is unlawfully removed and on receiving notice thereof ceases to perform services and surrenders all the property in his possession, believing he has been properly discharged, but protests against the removal when he learns it is illegal, by filing an action to set it aside, he does not acquiesce in his removal, or surrender or abandon his office. *Siefen v. Racine*, 129 Wis. 343, 109 N. W. 72.

Where the members of a police force were compelled without authority of law to accept a four day lay off on penalty of being discharged, they will not be estopped to recover their pay for the time they were laid off. *Louisville v. Gorley*, 25 Ky. L. Rep. 2174, 80 S. W. 203.

20. *Hagan v. Brooklyn*, 5 N. Y. S. 425; *Van Valkenburgh v. Mayor*, 63 N. Y. S. 6; *Jones v. Buffalo*, 178 N. Y. 45, 70 N. E. 99.

Conditions establishing right to recover salary. A policeman

who claims to have been illegally removed cannot maintain an action for salary alleged to have accrued after such dismissal while the dismissal remains unreversed. *Van Sant v. Atlantic City*, 68 N. J. L. 449, 53 Atl. 701.

Where a city ordinance fixed the compensation of a police officer to be paid for active service, he cannot recover salary for the time between his illegal suspension and his reinstatement. *Hawkins v. Bay City*, 149 Mich. 268, 14 Det. Leg. N. 424, 112 N. W. 997.

An officer who is unlawfully removed against his protest and without his consent, and fails to institute legal proceedings against the city for reinstatement, does not under the circumstances of the case, lose his right to compensation, for it is his legal right to wait, and then to enforce collection of his pay in the courts. *Larsen v. St. Paul*, 83 Minn. 473, 86 N. W. 459.

Upon the consolidation of the city of New York with the city of Brooklyn, a dockmaster in Brooklyn was assigned to duty as dockmaster in the department of finance, from which he was removed, but reinstated by order of the court. Here it was held that he was entitled to recover his salary from the time of his removal to the date of his rein-

the law to be that where it is the duty of one who has been unlawfully removed from office to seek to be reinstated, and he fails to do so, he cannot maintain an action for salary for a period subsequent to such removal.<sup>21</sup> However, it has been held also that an attempted removal which is illegal does not require the officer to proceed by *mandamus* to compel reinstatement, in order to maintain an action for salary.<sup>22</sup>

Relating to other defenses to actions of this character, some cases hold that payment of the salary to a *de facto*

statement. *Alsberge v. New York*, 78 N. Y. S. 145, 75 App. Div. 360.

An inspector of police who is reinstated may recover the salary of the position from the date of the order of reinstatement or the date on which he resumes his duties as inspector. *Cross v. New York*, 107 N. Y. S. 942, 123 App. Div. 917; *Grant v. New York*, 97 N. Y. S. 685, 111 App. Div. 160. But see *People v. Partridge*, 82 N. Y. S. 109, 83 App. Div. 262; and *Jones v. Buffalo*, 79 N. Y. S. 754, 79 App. Div. 328, affirmed in 178 N. Y. 45, 70 N. E. 99.

When a superintendent of aquariums, who was wrongfully discharged promptly resorted to *mandamus* to compel his reinstatement, but before the proceedings came to trial jurisdiction over the aquarium passed from the city to another corporation, he was not precluded from recovering damages for his discharge on the ground that he had not first established his right to reinstatement. *Bean v. Clausen*, 99 N. Y. S. 44, 113 App. Div. 129.

Under an ordinance fixing pay for time actually employed, a police officer cannot recover salary during the time he was unlawfully

removed without showing that he was ready and willing to perform the duties of his office during the period of removal, and that he had seasonably taken steps to bring about his reinstatement and had been reinstated. *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128; *Hawkins, v. Bay City*, 149 Mich. 268, 14 Det. Leg. N. 424, 112 N. W. 997.

One, although illegally removed, who takes no steps to ascertain his legal rights but who in fact acquiesces cannot recover compensation incident to the office during such time. *Hagen v. Brooklyn*, 126 N. Y. 643, 27 N. E. 264, 5 N. Y. S. 425.

When wrongfully prohibited from acting the salary is recoverable. *Memphis v. Woodward*, 59 Tenn. 499, 27 Am. Rep. 750.

21. *Cote v. Biddeford*, 96 Me. 491, 52 Atl. 1019.

But it is not essential that an employee first seek reinstatement before bringing an action for compensation when he has been "laid off." *Shane v. New York*, 116 N. Y. S. 685, 63 Misc. Rep. 304.

22. *Morgan v. Denver*, 14 Colo. App. 147, 59 Pac. 619.

officer during an illegal suspension or removal is a good defense;<sup>23</sup> that in such case the remedy of the *de jure* officer is by an action against the *de facto* officer for money had and received, and no recovery can be had therefor against the municipality.<sup>24</sup>

The city is not confined in its defense to the cause of removal specified in the resolution removing the officer but may plead and prove other matters sufficient in law to justify the removal.<sup>25</sup>

### § 521. Fees and commissions.

Under some laws compensation to public officers is fixed by fees or commissions, and frequently close legal points arise concerning the proper construction of such laws, as will appear from the numerous judicial decisions which abound in the application of these laws.

23. *Grant v. New York*, 97 N. Y. S. 685, 111 App. Div. 160; *Seifen v. Racine*, 129 Wis. 343, 109 N. W. 72.

24. *Wagner v. Louisville* (Ky., 1909), 117 S. W. 283; *Martin v. New York*, 81 N. Y. S. 412, 82 App. Div. 35, affirmed in 176 N. Y. 371, 68 N. E. 640.

Allowed, when does not appear to have been paid to *de facto* officer holding same office. *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410.

See § 518 *ante*.

25. *Davis v. Cordele*, 115 Ga. 770, 42 S. E. 63; *Macon v. Hays*, 25 Ga. 590.

Allowance of salary thereafter by council is not binding. *State v. Williams*, 6 S. D. 119, 60 N. W. 410.

**Defenses.** Where an officer is indicted and another is designated to perform the duties of his office

the indicted officer cannot on acquittal recover the salary for the balance of the term. *Brunswick v. Fahm*, 60 Ga. 109.

In an action for salary by a civil service employee who was wrongfully discharged without a hearing the fact that he had been guilty of such misconduct and neglect of duty as to make his removal inevitable in case he had been given a hearing is no defense. *Ransom v. Boston*, 196 Mass. 248, 81 N. E. 998.

In an action by a civil service employee for wages during time of illegal removal, the city cannot show in defense that the enrollment of such employee was unauthorized and he was therefore not entitled to notice and opportunity to make an explanation as provided for civil service employees. *Craigie v. New York*, 100 N. Y. S. 197, 114 App. Div. 880.

In a Missouri case an ordinance provided for the city attorney an annual salary and certain fees in cases of violations of city ordinances to be taxed as costs against and collected from the defendants therein, and it was ruled that the city attorney is entitled to such fees only when they are collected from the defendants.<sup>26</sup> So in a New York case the law recited that a corporation counsel would be entitled to all costs and allowances in actions and proceedings in which the city should be successful, and the court held that he is not entitled to such costs as against the city unless he shows they have been paid.<sup>27</sup>

In a Texas case, under a resolution of the council allowing the city attorney a commission on taxes collected by suit, it was announced that such attorney is entitled to commissions on judgments for taxes obtained by him and paid after he went out of office.<sup>28</sup> Other applications appear in the cases in the note.<sup>29</sup>

26. *Kemp v. Monett*, 95 Mo. App. 452, 69 S. W. 31.

27. *Rochester v. Sutherland*, 98 N. Y. S. 970, 112 App. Div. 712.

28. *Houston v. Stewart*, 40 Tex. Civ. App. 499, 90 S. W. 49.

"And if the city, without the attorney's consent arbitrarily released a portion of such judgments or if it purchased any of the property in satisfaction of the judgments against it, it would be liable to the attorney for the full amount of the commission."

"The attorney would be entitled to a *pro rata* share in the commission due on judgments collected by the city in suits which had been brought by him, but not decided at the time he went out of office." *Houston v. Stewart*, 40 Tex. Civ. App. 499, 90 S. W. 49, 54.

29. **Laws allowing fees and commissions illustrated.** Where

the city counselor receives and disburses money which should have gone through the hands of the treasurer and upon which he was entitled to commissions the city is liable for such commissions to the same extent as if the moneys had been handled by the treasurer himself. *Baxley v. Holton*, 114 Ga. 724, 40 S. E. 728.

Under the charter of the City of Oakland, the office of "auditor and assessor" is a single office, and the incumbent is not entitled to retain commissions on taxes collected, in addition to his salary. And in an action against such officer for such commissions evidence that he declared prior to his election that he intended to claim the commissions is immaterial. *Oakland v. Snow*, 145 Cal. 419, 78 Pac. 1060.

In an action by a municipal delinquent tax collector for commis-

## § 522. Expenses appertaining to public office.

Generally speaking a municipal corporation will not be liable for expenses incurred by its officers and employees unless they were duly authorized and made in the manner prescribed by law. This subject is controlled by legal provisions, and to a limited extent by custom and usage.<sup>30</sup>

Usually the municipal corporation is liable to officers for legitimate expenses made in connection with their official duties and such sums may be recovered of the city.<sup>31</sup> That is, when the officer is required in the per-

sions on taxes collected after his term had expired, he must show what he did and disclose facts entitling him to the commission sued for. *Covington v. Zeisz*, 108 S. W. 349, 32 Ky. L. Rep. 1320.

A statute provided that every hunter's license issued should bear the signature of the city or town clerk and his seal be affixed thereto, for which a stipulated fee should be paid to such clerk. Held, that such fees were received by him because he was such clerk and for services required by statute of the clerk, for which he received a salary and he cannot assume as such city clerk the character and relation of agency to another in discharge of a duty by services which can be performed by him only as such city clerk and was therefore not entitled to such fees. *In re Bernardi*, 117 N. Y. S. 727, 729, 133 App. Div. 510.

30. *Illinois*. *Coleman v. Elgin*, 45 Ill. App. 64.

*Maine*. *Commissioners v. Edgington*, 64 Me. 65.

*New Hampshire*. *Pike v. Middleton*, 12 N. H. 278; *Gove v. Ep- ping*, 41 N. H. 539.

*New York*. *Sniffen v. New York*, 6 N. Y. Super. Ct. (4 Sanf.) 193; *West v. Utica*, 71 Hun (N. Y.) 540, 24 N. Y. S. 1075.

*Pennsylvania*. *Gilchrist v. Wilkes Barre*, 142 Pa. 114, 21 Atl. 805.

As to exercise of powers by virtue of usage and custom, see §§ 368 and 370 *ante*.

Reimbursement for expenditures, §§ 367, 514 *ante*.

31. *Massachusetts*. *Cochrane v. Melrose*, 121 Mass. 563.

*North Carolina*. *Roper v. Laurinburg*, 90 N. C. 427, 7 Am. & Eng. Corp. Cas. 130.

*New Hampshire*. *Manchester v. Potter*, 30 N. H. 409.

*New Jersey*. *Barnert v. Pater- son*, 48 N. J. L. 395, 6 Atl. 15.

*Pennsylvania*. *Flanigan v. Philadelphia*, 19 Leg. Inst. (Pa.) 68.

*Rhode Island*. *Sherman v. Carr*, 8 R. I. 431.



formance of his official duties to incur expenses without fault or neglect on his part he may be reimbursed.<sup>32</sup>

The true test in all such cases is said to be, did the act done by the officer relate to a matter in which the local corporation had an interest, or affect municipal rights or property, or the rights or property of the citizens which the officer was charged with an official obligation to protect and defend.<sup>33</sup>

If the office rent of the officer is furnished free an allowance to the officer therefor is clearly unauthorized.<sup>34</sup> In Indiana under a statute requiring trustees of certain townships to set apart for the transaction of the township business such days of the week or month as the business might require, a township trustee cannot bind the township for the rent of an office in which to conduct such business.<sup>35</sup> So an officer cannot recover for the use of his own vehicle under a law which entitled the officer to all necessary expenditures actually made in the due performance of his public duties.<sup>36</sup>

32. *United States v. Flanders*, 112 U. S. 88, 5 Sup. Ct. 67, 28 L. Ed. 630; *Andrews v. United States*, 2 Story C. C. (U. S.) 202; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284.

33. See § 514 *ante*.

**Reimbursement for expenditures.**

*Georgia.* *Shaw v. Macon*, 19 Ga. 468.

*Iowa.* *Gormly v. Mount Vernon*, 134 Iowa 394, 108 N. W. 465; *McFadder v. Jewell*, 119 Iowa 321, 93 N. W. 302, 60 L. R. A. 401.

*Massachusetts.* *Lawrence v. McAlvin*, 109 Mass. 311.

*Minnesota.* *Moorehead v. Murphy*, 94 Minn. 123, 102 N. W. 219,

68 L. R. A. 400, 110 Am. St. Rep. 345.

*Missouri.* *State ex rel. v. St. Louis*, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

*New York.* *Kane v. McClellan*, 96 N. Y. S. 806, 110 App. Div. 44; *People v. Monroe*, 83 N. Y. S. 382, 85 App. Div. 542.

*Wisconsin.* *McCumber v. Waukesha Co.*, 91 Wis. 442, 65 N. E. 51.

34. *Gorman v. Tidholm*, 94 Ill. App. 371.

35. *State ex rel. v. Mills*, 142 Ind. 569, 41 N. E. 1026.

36. *McCumber v. Waukesha Co.*, 91 Wis. 442, 65 N. E. 51.

### § 523. Acceptance of a less sum than that allowed by law.

The acceptance of a less sum than that allowed by law, as salary or compensation, without objection, and in full satisfaction for services rendered will ordinarily estop the officer from claiming more.<sup>37</sup> The decisions in the note make various applications of this rule.<sup>38</sup>

37. *Arkansas*. *Rau v. Little Rock*, 34 Ark. 303.

*California*. *Coyne v. Rennie*, 97 Cal. 590, 32 Pac. 578.

*Missouri*. *Galbreath v. Moberly*, 80 Mo. 484.

*North Dakota*. *O'Hare v. Park River*, 1 N. D. 279, 47 N. W. 380.

*New York*. *Hobbs v. Yonkers*, 102 N. Y. 13, 5 N. E. 778; *Hobbs v. Yonkers*, 32 Hun (N. Y.) 454, 102 N. Y. 13, 5 N. E. 778.

*New Jersey*. *Love v. Jersey City*, 40 N. J. L. 456.

*Oregon*. *De Boest v. Gambell*, 25 Or. 368, 58 Pac. 72.

*Texas*. *McInery v. Galveston*, 58 Tex. 334; *McFall v. Austin*, 1 Tex. Civ. App. 208, 1 White & W. Civ. Cas. Texas Ct. App. § 452.

Estoppel applies to officers and employees. *Downs v. New York*, 173 N. Y. 651, 66 N. E. 1107.

Accepting under protest. *Chandler v. Johnson City*, 105 Tenn. 633, 59 S. W. 142.

38. Receipt of less estops the officer or employee from recovering more. A municipal employee who became entitled to an increase of wages but for six years accepted the wages paid him by the city at the old rate waives any claim that he might have had to recover the increase for that period. *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599, affirming 79 N. Y. S. 599.

Where a municipal employee had received and receipted in full for the regular wages of his position for several years, he cannot recover for overtime during that period. *Grady v. New York*, 182 N. Y. 18, 74 N. E. 488.

A laborer employed by a municipality may waive the benefit of a statute providing a minimum rate of wages on public work in the state, and accept a lower rate, and such waiver and acceptance will be binding upon him. *Bell v. Sullivan*, 158 Ind. 199, 63 N. E. 209.

A city employee who was permitted to work only three-fourths time because of an inadequate appropriation, and accepted a proportionate reduction in his weekly wages for five months cannot recover for the hours he was laid off. *Bannister v. New York*, 82 N. Y. S. 244, 40 Misc. Rep. 408.

Where street sweepers agreed to take a leave of absence without pay, because of an insufficient appropriation, and accepted their salaries with such deduction, they are not entitled to recover the difference. *Downs v. New York*, 78 N. Y. S. 442, 75 App. Div. 423, reversing 78 N. Y. S. 222, 38 Misc. Rep. 649.

A city laborer, who sometimes acts as foreman without being appointed as such, by receiving and

Sometimes the facts of the particular case will not warrant the application of the doctrine of waiver and estoppel.<sup>39</sup> Thus in an Illinois case it was determined, in view of the particular facts, that the acceptance by a patrolman in the civil service of compensation less than that fixed by ordinance does not estop him from claiming the amount fixed by ordinance.<sup>40</sup> So in New York it was held that a clerk in a municipal department who became entitled to an increase in salary, by accepting monthly payments at the old rate would not estop himself from recovering the difference.<sup>41</sup> And in the same state this decision was made: Where an officer's salary is reduced without authority and he accepts such salary from month to month and receipts in full he is not precluded from recovering the difference between the amount received and the amount the law authorized.<sup>42</sup>

receipting for his wages as laborer from week to week, without protest or complaint, waived all right he may have had to the greater compensation. *Farrell v. Buffalo*, 103 N. Y. S. 340, 118 App. Div. 597.

One holding a position as probationary patrolman who receives and accepts a specified sum per month in full for his services, without proper protest, cannot recover the difference between the amount so received and the pay of a regular policeman to which he claims to be entitled. *Riordan v. Chicago*, 124 Ill. App. 183.

Where a city deducted a half day's wages from the weekly wages of workmen for Saturday half holidays, and the men accepted the reduced rate for two years without protest they are estopped from claiming the dif-

ference. *Wagoner v. Philadelphia*, 215 Pa. 379, 64 Atl. 557.

39. When estoppel not applicable. *Pease v. Common Council* 126 Mich. 436, 85 N. W. 1082, 8 Det. Leg. N. 91; *Kehn v. State*, 93 N. Y. 291; *Clark v. State*, 142 N. Y. 101, 36 N. E. 817; *Brauer v. Portland*, 58 Pac. 861, 35 Or. 471, 59 Pac. 117, 60 Pac. 378; *De Boest v. Gambell*, 35 Or. 368, 58 Pac. 72.

40. *Chicago v. McNally*, 117 Ill. App. 434.

41. *Havron v. Dalton*, 83 N. Y. S. 321, 85 App. Div. 110.

42. *Grant v. Rochester*, 80 N. Y. S. 522, 79 App. Div. 460, affirmed in 175 N. Y. 473, 67 N. E. 1083.

Compare *Pryor v. Rochester*, 166 N. Y. 548, 60 N. E. 252; *Hobbs v. Yonkers*, 102 N. Y. 13, 5 N. E. 778; *People v. Police Board*, 75 N. Y. 38; *Emmitt v. New York*, 128 N. Y. 117, 28 N. E. 19.

### § 524. Assignment of salary.

The assignment of his salary by a public officer not yet due and to be earned in the future is void as against public policy.<sup>43</sup> Forbidding by ordinance the assignment of wages of municipal employees is a valid exercise of the authority of a municipal corporation in its private capacity, whereby it may enter into contracts.<sup>44</sup>

### § 525. Extra compensation not allowed.

Where an officer performs duties imposed by law he is entitled to the compensation therefor fixed by law and no other. He is not entitled to extra compensation for services performed in the line of his official duty. The fact that the salary or compensation may be recognized as inadequate remuneration for the services exacted and actually performed does not change the rule. And the principle is the same although his duties are greatly increased. Courts everywhere recognize the necessity of protecting the public funds and hence usually enforce the rule against permitting extra compensation either directly or indirectly, with appropriate strictness.<sup>45</sup>

43. *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280; *Beal v. McVicker*, 8 Mo. App. 202.

Where a highway commissioner had for several years been accustomed to accept assignments of wages made by men working under him, and the wages afterwards earned by the assignors had been paid to the assignees by the city treasurer the court was warranted in finding that the city had constituted such commissioner its agent for that purpose. *Lamoreaux v. Morin*, 72 N. H. 76, 54 Atl. 1023.

44. *State ex rel. v. Kent*, 98 Mo. App. 281, 287, 71 S. W. 1066.

45. *Colorado. Durango v. Hampson*, 29 Colo. 77, 66 Pac. 883.

*Iowa. Fawcett v. Eberly*, 58 Iowa 544; *Council Bluffs v. Waterman*, 86 Iowa 688, 53 N. W. 289; *Bryan v. Des Moines*, 51 Iowa 590, 2 N. W. 414; *Des Moines v. McHenry*, 51 Iowa 710, 2 N. W. 264; *Christ v. Des Moines*, 53 Iowa 744, 2 N. W. 419, 4 N. W. 869.

*Indiana. Brazil v. McBride*, 69 Ind. 244.

*Kentucky. Covington v. Mayberry*, 9 Bush. (72 Ky.) 374.

*Louisiana. Lacey v. Waples*, 28 La. Ann. 158.

*Maine. Edgecomb v. Lewistown*. 71 Me. 343.

Some state constitutions provide that the legislature shall have no power to grant, or to authorize any municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contrac-

*Michigan.* Iron Mountain v. Uddenberg, 127 Mich. 189, 8 Det. Leg. N. 262, 86 N. W. 434.

*Missouri.* Carroll v. St. Louis, 12 Mo. 444; Chamberlain v. Kansas City, 125 Mo. 430, 28 S. W. 745; State ex rel. v. Holladay, 67 Mo. 64; Lemoine v. St. Louis, 120 Mo. 419, 25 S. W. 537.

*Nebraska.* Hayes County v. Christner, 61 Neb. 272, 85 N. W. 73.

*New Jersey.* Evans v. Trenton, 4 Zab. (N. J.) 765, approved in State v. Paterson, 40 N. J. L. 186, 188.

*New York.* In re Village of Kenmore, 110 N. Y. S. 1008, 1014, 59 Misc. Rep. 388; McCabe v. New York, 79 N. Y. S. 176, 77 App. Div. 627; Bruns v. New York, 6 Daly (N. Y.) 156; McCarthy v. New York, 96 N. Y. 1, 48 Am. Rep. 601.

*Oregon.* McGuire v. Baker City, 27 Or. 340, 41 Pac. 669.

**Extra compensation not allowed—illustrations.** Where a bridge was built between two towns at their joint expense and the highway commissioners of such towns were authorized to make contracts therefor, such commissioners in building the bridge did not act as a joint board for that purpose but each acted for his own town and neither they nor the corporation counsel were entitled to extra compensation. Marshal v. Hayward, 77 N. Y. S. 57, 74 App. Div. 27.

So where a police officer was assigned to the performance of the duties of the next higher rank

without legal appointment thereto, he was not entitled in the absence of a legal contract or enabling statute to any extra pay or compensation therefor. McDevitt v. Jersey City, 77 N. J. L. 375, 71 Atl. 1121, affirmed, 76 Atl. 1118.

Where the charter fixes the supervisor's salary and provides that he shall not "receive any other fee or reward whatever" he is not entitled to pay for collecting county tax which the law requires him to collect as such officer. Poughkeepsie v. Wiltsie, 36 Hun (N. Y.) 270.

Under a law providing that a police judge shall receive no other compensation for his services than a salary fixed by the council he may be allowed the local fees for acting as justice of the peace. Portland v. Denny, 5 Or. 160.

"No officer receiving a salary shall receive any fees or other compensation for his services." St. Louis Charter, art. III, § 26, p. 8.

Where the statutes provided that the salary of the county clerk shall be "in full of all services whatsoever by law required to be performed in his office," he cannot bind the county to pay for extra clerk hire. Board of Commissioners v. Sherwood, 64 Fed. 103.

See also, Ellis v. Tulare County, (Cal. 1896), 44 Pac. 575.

Not allowed for special service in absence of legal provision. Nash v. Knoxville, 108 Tenn. 63,

tor, after service has been rendered or a contract has been entered into and performed in whole or in part.<sup>46</sup>

64 S. W. 1062; *Anderson v. Milwaukee*, 113 Wis. 1, 88 N. W. 905.

Act granting pensions to police officer, after service, etc., held valid. *Pennie v. Reis*, 80 Cal. 266, 22 Pac. 176.

Where a city charter provides that the city attorney "shall do all and every professional act incident to the office which may be required of him," he cannot recover for the codification of the laws applicable to such city, as such service is held to be within the line of his duty as prescribed by charter. *Hays v. Oil City* (Pa. St. 1887), 11 Atl. 63.

Scope of duties of city attorney. *Smith v. Waterbury*, 54 Conn. 174, 7 Atl. 117; *Rice v. Osage*, 88 Iowa 558, 55 N. W. 532; *Callias v. Whidden*, 64 Me. 249; *Baltimore v. Ritche*, 51 Md. 233; *Leveridge v. New York*, 3 Sandf. (5 N. Y. Super. Ct.) 263.

Power to allow a city attorney fees includes power to allow a commission on collections of both civil and criminal causes. *Austin v. Johns*, 62 Tex. 179.

Where a city has no power to provide for the compensation of a city attorney except by ordinance, such attorney cannot perform ordinary legal services for the city and claim therefor extra compensation on the theory of an implied contract or estoppel. And a resolution of the mayor and council is insufficient to authorize compensation in addition to that allowed by ordinance. *Johnson v. Winfield*, 75 Kan. 832, 89 Pac. 657.

Contract prior to his appointment as city counselor. One who prior to his appointment as city counselor had been employed to conduct to its termination certain litigation on behalf of the city which also became his official duty after appointment, cannot recover of the city on a *quantum meruit* for services in such suit after he became city counselor in the absence of any agreement that the business of carrying on such suit though falling within his official duties, should not be considered as included among the services paid for by the annual salary, but should be compensated for in some other manner. *Detroit v. Whittemore*, 27 Mich. 231, per Cooley, J. performed before business hours in the morning. *Morgan v. New York*, 94 N. Y. S. 175, 105 App. Div. 425. See also, *McCabe v. New York*, 176 N. Y. 587, 68 N. E. 119, affirming 79 N. Y. S. 176, 77 App. Div. 637.

Where a board of park commissioners, under authority of the charter fixed the number of hours constituting a day's labor for park employees for which they were to be paid a certain amount per day, an employee with whom no express contract for wages had been made is entitled to reasonable compensation for overtime. *O'Boyle v. Detroit*, 131 Mich. 15, 9 Det. Leg. N. 208, 90 N. W. 669.

46. Const. Mo. 1875, art. IV, § 48.

Work outside of office hours ordinarily will not justify extra pay where the salary is definitely prescribed by law;<sup>47</sup> and, in such case, services performed by the officer outside of his official duties will not entitle the officer to additional compensation.<sup>48</sup>

47. *Missouri. Le Moine v. St. Louis*, 120 Mo. 419, 25 S. W. 537.

*New York. Palmer v. New York*, 2 Sandf. (4 N. Y. Super. Ct.) 318.

**Work outside of office hours—overtime.** Where taking affidavits was part of the duties of the chief messenger in the department of buildings, he cannot recover compensation for such service though

48. *Rothrock v. Easton School District*, 133 Pa. St. 48, 19 Atl. 483; *Chamberlain v. Kansas City*, 125 Mo. 430, 28 S. W. 745.

**Services outside of official duties—illustrations.** When a justice of the peace is not entitled to fees for acting as police magistrate under special provisions. *Furth v. McIntosh*, 2 Wash. 108, 26 Pac. 79.

An alderman who is *ex officio* a supervisor is not entitled to salary for services as supervisor. *Billings v. New York*, 68 N. Y. 413.

Where the charter fixed the salary of the clerk, and required him, among other duties to act as a member of the board of review he is not entitled to compensation in addition to his salary for services as member of such board. *Anderson v. Milwaukee*, 113 Wis. 1, 88 N. W. 905.

When city clerk may receive pay for acting as a member of the board of review where charter does not forbid. *Powers v. Oshkosh*, 56 Wis. 660, 14 N. W. 826.

A mayor received fees while acting as recorder. Under the law the recorder was appointed. Held, that the mayor was not entitled to such fees thereafter. *Thaison v. Sanchez*, 13 Tex. Civ. App. 73, 35 S. W. 478.

A secretary of a municipal board of health whose duties are merely clerical, can not recover from the city for services rendered in the treatment of small pox patients during an epidemic, where there is nothing to show that the city accepted the services or was given notice that it would be charged therefor. *Nash v. Knoxville*, 108 Tenn. 68, 64 S. W. 1062.

Where a clerk in one of the municipal departments took affidavits at the request of his superior officer, believing it was his duty to do so, and without any expectation of receiving fees therefor, he is not entitled to recover fees for such service. *Benjamin v. New York*, 78 N. Y. S. 1067, 77 App. Div. 62.

An employee in the legal department who acts as notary public, without intending to charge therefor cannot recover fees for such services. *Hughes v. New York*, 176 N. Y. 585, 68 N. E. 1113, affirming 82 N. Y. S. 905, 84 App. Div. 347.

A clerk in the office of the commissioner of jurors is not entitled to recover fees for services as

Knowledge on the part of the municipal authorities of the performance of extra service will not bind the local corporation to give additional pay.<sup>49</sup> Nor can extra compensation be allowed by virtue of usage, although long standing.<sup>50</sup> Nor will a promise to pay the officer extra compensation avail to bind the municipal corporation, as such promise is against "sound policy, and quasi-extortion."<sup>51</sup>

### § 526. Same—when extra compensation may be received.

Extra pay may be allowed in some cases, for the performance of additional services, but, of course, this must depend on the law and the nature of the duties of the office.<sup>52</sup> While as mentioned, a public official may not

commissioner of deeds in taking affidavits in cases of delinquent jurors, where his own testimony indicates that he rendered the services without any intention of charging the city therefor. *Knox v. New York*, 79 N. Y. S. 985, 78 App. Div. 368.

Under the charter of Kansas City it has been held that a clerk in a municipal office may claim fees as a notary public in addition to his compensation as a clerk from the city. *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433.

49. *Clark v. Portsmouth*, 68 N. H. 263, 44 Atl. 388.

50. An officer cannot recover additional compensation for expenses incurred by him in the performance of his official duties, although by a usage, long antedating the statute which fixed his compensation, such incidental expenses may have been paid without objection. *Albright v. Bedford County*, 106 Pa. St. 582.

See § 369 *ante*.

51. *California*. *Heslep v. Sacramento*, 2 Cal. 580.

*Illinois*. *May v. Chicago*, 222 Ill. 595, 78 N. E. 912; *Decatur v. Vermillion*, 77 Ill. 315.

*Iowa*. *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532.

*New York*. *Hatch v. Mann*, 15 Wend. 44.

*Ohio*. *Gillmore v. Lewis*, 12 Ohio 281, where it is said (p. 286): "Such promise could not be enforced at common law, being against sound policy, and quasi-extortion. English judges have declared that such claims by them are novel in courts of justice and that actions founded on such promises are scandalous and shameful. 2 Burr. 924."

52. *Calais v. Whidden*, 64 Me. 249.

**Extra pay for extra work.** City comptroller allowed pay as duly appointed agent of city in an action with respect to certain bonds. *Detroit v. Redfield*, 19 Mich. 376.



receive extra pay for services rendered by him for which compensation by way of salary is allowed by law, sometimes he may recover pay for other services which he may render outside of and in addition to his ordinary official duties which could as well be performed by other persons as by the officer.<sup>53</sup> Thus it has been held that, a charter provision forbidding an officer from receiving compensation for his official duties in addition to his salary does not extend to payments for services not within the compass of his official duties.<sup>54</sup>

So under a particular charter provision it has been held that the municipal authorities may contract with a law officer of the city to collect specified tax bills and allow the attorney one-half of the sum so collected, provided that he receives nothing in case of non-collection, where the duties authorized by the contract do not include any of the duties or emoluments of the office.<sup>55</sup> So where a

Compensation of city marshal for killing dogs under special provisions. *Independence v. Trouvalle*, 15 Kan. 70; *Neiswanger v. Kansas City*, 71 Mo. 36.

Commissions are sometimes allowed as extra pay in addition to salary. *Wesson v. Collins*, 72 Miss. 844.

Where a city surveyor has a fixed salary the council may prescribe additional duties and give extra pay. *Kollock v. Dodge*, 105 Wis. 187, 80 N. W. 608.

53. *State v. Vasaly*, 98 Minn. 46, 107 N. W. 818.

54. *People v. Monroe County Court*, 93 N. Y. S. 452, 105 App. Div. 1.

55. *State ex rel. v. New Orleans*, 20 La. Ann. 172.

**Extra pay for extra work.** Where an ordinance provided that an officer should be paid a certain sum per day in addition to his

salary for doing certain work, and he failed to do such work he is not entitled to the extra compensation. *Durango v. Hampson*, 29 Colo. 77, 66 Pac. 883.

When city solicitor entitled to recover for services rendered without special employment as assistant counsel in litigation in which the city was concerned. *Caverly v. Lowell*, 83 Mass. 289.

In Kansas held, that where a county attorney goes beyond the limits of his county to do business for his county and the court found that the services rendered were beyond and outside of his duties as county attorney, at the instance and with the consent of the county board, he may recover reasonable compensation for such services in addition to his salary although there is no express contract between the attorney and the board that he shall receive

police justice is regularly employed to assist in revising the ordinance which service is outside of his official duties as police justice he is entitled to recover compensation therefor in like manner as a stranger.<sup>56</sup> But as stated where the duties are included among those of the office he cannot recover extra compensation therefor.<sup>57</sup>

### § 527. Illegal salaries or fees may be recovered.

Usually, compensation illegally paid to an officer or employee may be recovered by the public.<sup>58</sup> Thus money paid by a municipal corporation to one of its officers in excess of his lawful salary or fees may be recovered by the corporation in an action against the officer for money had and received to its use, although the payments were

compensation therefor. The law, in such case, will imply a contract. *Huffman v. Greenwood Co. Commissioners*, 23 Kan. 281.

Under an ordinance providing that for services of an extraordinary character rendered the city by a city attorney he should receive such fees as might be agreed upon, the city attorney is entitled to no compensation for extraordinary services where he failed to obtain the agreement of the council thereto. *Ludlow v. Richie*, 25 Ky. L. Rep. 1581, 78 S. W. 199.

Under an ordinance prohibiting a city officer from receiving any compensation beside his salary for the services rendered except the salary or fees established by law or by ordinance or resolution of the common council, a city attorney of such city cannot recover for services as special counsel authorized by a special committee of such city council under a resolution of the council empowering such committee to employ in its discretion special counsel. *Mac*

*Lear v. Newark*, 77 N. J. L. 712, 73 Atl. 503.

One may be employed as an attorney and recover the value of services rendered by him for the city although he is at the same time mayor and councilman, in the absence of a showing of collusion or fraud in his employment as attorney. *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

56. *McBride v. Grand Rapids*, 37 Wis. 236, 10 N. W. 253.

57. *Carroll v. St. Louis*, 12 Mo. 444; *Bookman v. New York*, 117 N. Y. S. 197, 199, 133 App. Div. 242.

Where the council has power to determine and fix the salary of the city attorney, it has the power to grant him additional compensation for preparing a revision of the city charter. *Cloonan v. Kingston*, 75 N. Y. S. 425, 37 Misc. Rep. 322.

58. *People v. Starkweather*, 10 Jones & St. (42 N. Y. Super. Ct.) 325.

made on the order of officials properly charged with such duty with a full knowledge of the facts and without fraud. The defense of involuntary payment is not available in such case, for the knowledge of the officer of the authority of the officials who made illegal payments must be presumed.<sup>59</sup> Such illegal acts are *ultra vires*, outside of the agency of the officials, and are not binding on their principals, the people. Therefore, such unwarranted payment of excessive compensation or fees cannot be ratified.<sup>60</sup>

So, where through mistake a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account between him and the county is not a bar to an action by it to recover the excess.<sup>61</sup>

On the contrary, it was held in Washington that where a municipal corporation with full knowledge of all the facts, and without violating any law, pays an officer, as a councilman, for his services it cannot recover the money so paid on the ground that it was not obliged to pay it by any law, ordinance or contract.<sup>62</sup> And recovery has been denied in other cases in view of the particular facts appearing.<sup>63</sup>

## § 528. Changing salaries or compensation of officers and employees.

Unless forbidden by law the salary or compensation of an officer or employee of a municipal corporation may be changed from time to time, increased or diminished during the continuance of the term or period of employment by the authority possessing the power in the

59. *Camden v. Varney*, 63 N. J. L. 325, 43 Atl. 889.

60. *Demarest v. New Barbadoes*, 40 N. J. L. 604, 607.

61. *Sheibley v. Dixon County*, 61 Neb. 409, 85 N. W. 399.

62. *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

63. Recovery of the increased salary denied on the ground that  
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the increase was illegal. *Cox v. New York*, 103 N. Y. 519, 9 N. E. 48.

The recovery denied, by mistake of the accounting officer the officer received a sum little in excess of what he was entitled to. *Philadelphia v. Gilbert*, 14 Phila. (Pa.) 212.

premises.<sup>64</sup> But in changing salaries when authorized the law applicable must be substantially observed.<sup>65</sup>

If the salary is fixed definitely by the municipal charter it cannot be changed by ordinance, and if settled by state statute usually it cannot be varied by ordinance.<sup>66</sup> So a salary fixed by ordinance ordinarily cannot be changed by resolution.<sup>67</sup>

Without express authorization municipal authorities cannot change the salaries of state officers.<sup>68</sup>

64. *Iowa*. *Iowa City v. Foster*, 10 Iowa 189.

*Indiana*. *Brazil v. McBride*, 69 Ind. 244.

*Louisiana*. *State ex rel. v. New Orleans*, 20 La. Ann. 172.

*Minnesota*. *State v. Hill*, 32 Minn. 275, 20 N. W. 196.

*Michigan*. *People v. Detroit*, 38 Mich. 636.

*Missouri*. *Givens v. Daviess County*, 107 Mo. 603, 17 S. W. 998; *Wilcox v. Rodman*, 46 Mo. 322.

*New Hampshire*. *Marden v. Portsmouth*, 59 N. H. 18.

*New Jersey*. *Love v. Jersey City*, 40 N. J. L. 456.

*New York*. *Black v. Board of Education*, 92 N. Y. S. 118; *Sugden v. Partridge*, 174 N. Y. 87, 66 N. E. 655.

*Pennsylvania*. *Commonwealth v. Bacon*, 6 Serg. & R. (Pa.) 322.

*Texas*. *McFall v. Austin*, 1 White & W. Civ. Cas. Ct. of App. of Texas, § 450.

*Wisconsin*. *Kollock v. Dodge*, 105 Wis. 187, 80 N. W. 608.

65. *Taylor v. New York*, 67 N. Y. 87.

66. *Illinois*. *Bourke v. Chicago Sanitary Dist.*, 92 Ill. App. 333.

*Iowa*. *Fawcett v. Woodbury County*, 55 Iowa 154.

*Louisiana*. *Behan v. New Orleans*, 34 La. Ann. 128.

When by the charter the city council were empowered to fix the auditor's salary at an amount not in excess of \$1,200 per year and in an attempt to abolish the office the salary was reduced to \$300 per year, such reduction was held to be an abuse of discretion and the salary fixed on *mandamus* proceedings at \$900 per year, the lowest reasonable salary for such office. *State v. Shreveport*, 124 La. 178, 50 So. 3.

The power to fix salaries and fees of officers does not carry with it the authority to affect compensation allowed by charter. *Carr v. St. Louis*, 9 Mo. 192.

Where the salary of an office is increased by ordinance and an officer is elected the increase takes effect from the beginning of the term. *Stuhr v. Hoboken*, 47 N. J. L. 147.

67. *Hisey v. Charleston*, 62 Mo. App. 381.

See chapter 15 *post*.

68. As clerks of court. *Jarvis v. New York*, 49 How. Pr. (N. Y.) 354; *London v. New York*, 39 N. Y. Super. Ct. 467.

### § 529. Laws forbidding change of salary during term.

Many state constitutions, charters and laws forbid, in express terms, the increase or reduction of salaries or compensation of officers during the term for which they were elected or appointed, and evasion of such laws are not permitted by the courts.<sup>69</sup>

69. *Arkansas*. Barnes v. Williams, 53 Ark. 205, 13 S. W. 845.

*California*. Buck v. Eureka, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243; Marquis v. Santa Ana, 103 Cal. 661, 37 Pac. 650; Milner v. Reibenstein, 85 Cal. 593, 24 Pac. 935; Const. Cal., art. XI, § 9.

*Connecticut*. Garvie v. Hartford, 54 Conn. 440.

*Iowa*. Cox v. Burlington, 43 Iowa 612; Council Bluffs v. Waterman, 86 Iowa 688, 53 N. W. 289.

*Illinois*. Cook Co. v. Sennott, 136 Ill. 314, 26 N. E. 491; Winn v. Walker, 145 Ill. App. 333, 89 N. E. 264; McGovney v. Melrose Park, 241 Ill. 142, 89 N. E. 599.

*Kentucky*. Board of Education of Lexington v. Moore, 26 Ky. L. Rep. 1478, 71 S. W. 621.

*New Jersey*. Stuhr v. Hoboken, 47 N. J. L. 147; Kies v. West New York, 79 N. J. L. 164, 74 Atl. 337.

*New York*. Smith v. New York, 3 Thomp. & C. (N. Y.) 160; Rowland v. New York, 83 N. Y. 372; Hartman v. New York, 89 N. Y. S. 517, 126 App. Div. 362; Havron Case, 83 N. Y. S. 321, 85 App. Div. 110.

*Washington*. Tacoma v. Lillis, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

**Changing salary during term—illustrations.** A legislative act prescribed that the salary

shall not be less than \$2500, and an ordinance fixed it at \$3000. Here it was held that the act only limited the amount, hence the ordinance was valid. *Louisville v. Wilson*, 99 Ky. 598, 36 S. W. 944.

"The compensation or fees of no municipal officer shall be increased during his term of office." Const. Mo. 1875, art. XIV, § 8; Charter St. Louis, art. III, § 26, par. 8.

The prohibition against increase of salaries during the term applies where the city during term of an officer passed from the second to first class. *Barnes v. Williams*, 53 Ark. 205, 13 S. W. 845.

Under the laws of Kentucky an allowance by a board of education to a city treasurer of a salary as treasurer of such board is unlawful as being an increase of salary during the term of office of such treasurer. *Board of Education v. Moore*, 24 Ky. L. Rep. 1478, 71 S. W. 621.

The compensation of an officer at the time of his appointment, fixed by statute, cannot be changed by a statute enacted during his term. *Jenkins v. Scranton*, 202 Pa. 267, 51 Atl. 994.

Sometimes authority to increase compensation of officer for additional duties is limited

Under some laws the salary may be reduced before the appointment to office and the reduced amount will control the officer's compensation.<sup>70</sup> And it has been

to one increase. *Cox v. New York*, 103 N. Y. 519, 9 N. E. 48.

Where under the charter the compensation of an officer is to be fixed by the board of public works and approved by the council the mayor alone cannot reduce the salary. *Fountain v. Jackson*, 50 Mich. 15, 14 N. W. 680.

Where salary is fixed by law and the officer has performed his duties an auditing board is not authorized to provide for a less sum. *People v. New York*, 43 How. Pr. (N. Y.) 412.

The judge of a city court is a "judge of an inferior court of record" within the meaning of a provision of the constitution prohibiting an increase or decrease of salary of such judges during their terms. *Wolf v. Hope*, 210 Ill. 50, 70 N. E. 1082.

An ordinance changing the salary of the city treasurer and directing the receipt and disbursement of moneys by others than the treasurer, which is invalid because of the latter provision, leaves the compensation of the treasurer as it was before. *Grenada v. Wood*, 81 Miss. 308, 23 So. 173.

The compensation of a municipal officer may, with the consent of the officer, be changed by the municipality at any time, so long as such municipal action is taken in good faith, and in the exercise of reasonable discretion and

judgment. *Carling v. Jersey City*, 71 N. J. L. 154, 58 Atl. 395.

Where the compensation of an officer cannot be changed during his term, it cannot be affected by an ordinance which became effective after the beginning of his term. *Chicago v. Wolf*, 221 Ill. 130, 77 N. E. 414.

**Civil service.** Under the New York charter the salaries of persons holding positions in the classified civil service cannot be reduced without reasons therefor given in writing and an opportunity given to make explanation. *Waters v. New York*, 88 N. Y. S. 238, 43 Misc. Rep. 154.

**Veteran.** The reduction of the salary of a veteran which is reasonable and does not amount to a removal or the forcing of a resignation is not prohibited by the veteran laws of New York. *Black v. Board of Education*, 92 N. Y. S. 118.

**Police officers.**

*Connecticut.* *Sullivan v. Bridgeport*, 81 Conn. 660, 663, 71 Atl. 906.

*New Jersey.* *Leonard v. Fagen*, 76 N. J. L. 431, 69 Atl. 980; *Coughlin v. Fagen, Id.*; *Maxwell v. Fagen, Id.*

*New York.* *Mangam v. Brooklyn*, 98 N. Y. 585, 5 Am. Rep. 705; *People v. Greene*, 84 N. Y. S. 484, 87 App. Div. 421.

70. *Parris v. Webb Co.*, 17 Ky. L. Rep. 1006, 33 S. W. 87.

held that the reduction may be made after appointment, and before the commencement of the term.<sup>71</sup> So it has been held in Texas that an ordinance passed after the election of a municipal officer but before he qualified, increasing the salary of the office, is not in violation of a charter forbidding the increase of the salaries of officers during their terms.<sup>72</sup>

Laws of this character are generally construed to apply only where the salary or compensation has been definitely prescribed or fixed by law. In the absence of such regulation salary or compensation may be established during the term.<sup>73</sup>

Laws providing that the change of salary shall not take effect during the term for which the officer was elected or appointed are usually construed to prohibit any change of salary after election or appointment to take effect during the term for which the officer was elected or appointed.<sup>74</sup>

71. *Wesch v. Detroit*, 107 Mich. 149, 64 N. W. 1051.

Ordinance changing salary, held not to apply to incumbent at the time of its passage. *Lowry v. Lexington*, 113 Ky. 763, 68 S. W. 109.

72. *Riggins v. Richards*, 97 Tex. 229, 556, 79 S. W. 84, 80 S. W. 524.

73. *State v. McDornell*, 19 Neb. 442; *Purcell v. Parks*, 82 Ill. 346; *Rucker v. Supervisors*, 7 W. Va. 661.

Under such provisions a city council whose members receive no regular pay have the right to provide compensation to members for special services performed as member of a committee. *Garvie v. Hartford*, 54 Conn. 440, 7 Atl. 723.

74. *Meissner v. Boyle*, 20 Utah 317, 58 Pac. 1110.

**Change during term — Illustrations.** Under the St. Louis charter the time an officer holds over the designated period of four years is as much a part of the term of his office as that which precedes the date at which a new appointment should be made and no increase of salary made during his term can be allowed him for such time so held over. *State ex rel. v. Smith*, 87 Mo. 158.

Prohibition against increase during term construed to mean the municipal year and not the term of office. *McUnery v. Galveston*, 58 Tex. 334.

The provision is usually that compensation cannot be increased during "continuance in office." The phrase "continuance in office" means continuing in office under one appointment. *Smith v.*

But if the same officer is reappointed or re-elected to another term, after the expiration of his first term he may receive legally the additional salary.<sup>75</sup> However, he cannot resign in order to receive the increase and be reappointed or re-elected.<sup>76</sup>

Laws of this character are restricted often to officers proper or municipal officers, and hence, when so restricted do not apply to officers other than municipal or city officers, as for example, subordinates, assistants or mere employees.<sup>77</sup> Ordinarily, the compensation or salaries

Waterbury, 54 Conn. 174, 7 Atl. 17.

Where the salary is reduced by ordinance passed during the term it will be held not to take effect until the expiration of the term. Roodhouse v. Johnson, 57 Ill. App. 73.

Increase but two days after beginning of term, void. Weeks v. Texarkana, 50 Ark. 81.

An officer cannot by delay in having his bond approved extend his term of office so as to receive the benefit of the ordinance increasing the salary of such office. Rightmire v. Duffield, 50 N. J. L. 43, 13 Atl. 30.

75. Smith v. Waterbury, 54 Conn. 174.

76. State v. Hudson County, 44 N. J. L. 388.

One reappointed to an office under a resolution reducing his compensation must serve at the reduced rate as this is a new term and does not violate any law forbidding the change of the compensation during the term. Doolan v. Manitowoc, 48 Wis. 312, 4 N. E. 475.

77. Officer. A city officer appointed by the council and subject to removal by it at pleasure

is not an officer within the meaning of the constitution, prohibiting the increase of the salary of an officer during his term of office. State ex rel. v. Johnson, 123 Mo. 43, 25 S. W. 855.

See § 422, *et seq. ante*.

Under a provision forbidding reducing the compensation during the term of municipal officers, held members of the boards of public safety and public works and the secretaries of such boards are municipal officers. Louisville v. Wilson, 99 Ky. 598, 36 S. W. 944.

Officer does not include assistants and clerks. The Municipal Code of St. Louis (McQuillin, 1901), pp. 379, 381, §§ 91 and 92.

See § 425, *et seq. ante*.

The salary of a clerk who received the maximum salary of the grade in which he is employed cannot be raised above that amount without operating as a promotion, requiring him to take a civil service examination. People v. Knox, 75 N. Y. S. 896, 71 App. Div. 306.

An "officer" within the St. Louis charter provision forbidding the change of an officer's salary during the term for which



of assistants, subordinates, clerks and employees in the municipal service may be increased or diminished, the power to change, of course, depends on the law applicable.<sup>78</sup> If the law forbids, it follows that no change can be legally made.<sup>79</sup>

Laws of the character under consideration are usually strictly construed and evasions of any nature receive the displeasure of the courts, as the numerous cases in the notes show clearly.<sup>80</sup>

he was elected or appointed, is one who by the local law enjoys either an annual salary or a definite term of office. As to other officers not included in the above definition, it is competent for the municipal assembly to alter their salaries or tenures of office. *State ex rel. v. Longfellow*, 95 Mo. App. 668, 69 S. W. 596.

78. *Devoy v. New York*, 39 Barb. (N. Y.) 169; *Sullivan v. New York*, 48 How. Pr. (N. Y.) 238; *Gillespie v. New York*, 6 Daly (N. Y.) 286; *Morris v. New York*, 99 N. Y. 645, 1 N. E. 671.

79. *Hanauer v. Utica*, 75 Hun (N. Y.) 524, 27 N. Y. S. 663.

80. **Changes of salaries—illustrations.** Where law forbids increase during term a city officer cannot by contract have his compensation increased. *Purdy v. Independence*, 75 Iowa 356, 39 N. W. 641; *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532.

A contract between a city attorney and the city covering services within the line of his duty, held illegal as being an attempt to increase his compensation during his term of office in violation of the constitution. *Buck v. Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243.

Where compensation has been fixed by ordinance a resolution increasing the compensation is void where the city has forbidden the increase or decrease of compensation during official terms. *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

A mere promise of a board of education unsupported by a consideration, to increase the salary of the superintendent of schools is not enforceable, and gives no right to such superintendent to recover the increase. *Ward v. Board of Education*, 21 Ohio Cir. Ct. 699, 11 O. C. D. 671.

A mere estimate of the amount of salary to be paid an officer for an ensuing year, coupled with action by proper authorities to the end that such amount may be raised, is insufficient in the absence of a statute fixing the salary, upon which to predicate either an increase or decrease of salary. *Lyons v. New York*, 81 N. Y. S. 1079, 82 App. Div. 306.

A voluntary increase of the salary of a superintendent of schools given as a reward for meritorious services is against public pol-

**§ 530. Fees or compensation of attorneys and agents specially employed.**

Where authority exists for the employment of attorneys and agents, when the services are rendered and the obligation to pay therefor arises, in the absence of agreement touching the sum to be paid, what such services are reasonably worth may be recovered.<sup>81</sup>

icy. *Lyons v. New York*, 81 N. Y. S. 1079, 82 App. Div. 306.

The constitutional provision forbidding the increase of salary during term is not violated by providing the officer with a deputy at a fixed compensation. *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974.

**Contra.** Where law prevents increase of salary during term, an order of a board allowing an officer a deputy at a certain salary is in effect an increase during his term and is therefore void. *Dougherty v. Austin*, 94 Cal. 601, 29 Pac. 1092.

An appropriation of the amount for the salary of an officer being smaller than that heretofore paid is not a reduction of the salary to such amount especially where the council allows the salary bill at the former rate. *Fountain v. Jackson*, 50 Mich. 260, 15 N. W. 487.

Compensation of a member of a board of the legislature of a city fixed at five dollars for attendance at each meeting held not to be "salary" mentioned in the constitution. *Gobrecht v. Cincinnati*, 51 Ohio St. 682, 23 L. R. A. 609, 36 N. E. 782.

Under a constitutional provision providing that no "law" shall

increase or diminish the salary of a public officer after his election or appointment it was held that this applied only to a law enacted by the legislature and not to ordinances passed by a city. *Baldwin v. Philadelphia*, 99 Pa. St. 164.

81. *Stewart v. Council Bluffs*, 58 Iowa 642; *Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Bleecker v. New York*, 7 Daly (N. Y.) 439, reversing 5 Hun (N. Y.) 282.

**Estoppel.** A city is not estopped from denying its liability on a contract by the council for the services of a special attorney, when there was no authority for making it. *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406.

**Implied contract.** A city is not liable upon an implied contract to pay the reasonable value of professional services rendered by an attorney other than the city attorney in advising the mayor and aldermen, where his employment has not been authorized or ratified by ye and nay vote of the common council. *Bosard v. Grand Forks*, 13 N. D. 587, 102 N. W. 164.

**Usage cannot control.** *Bruns v. Green Bay*, 78 Wis. 81, 46 N. W. 889.

### § 531. Certifying and paying salaries.

Laws usually prescribe the manner in which the pay rolls of municipal officers and employees shall be made out and certified and the time and method of payment of salaries, and as a general rule the proceedings so directed are required to be, in substance, observed. Thus, where demand on the treasurer for salary properly audited, within one month after it is due and payable, is required such provision must be followed otherwise it will be forever barred.<sup>82</sup>

An officer or employee cannot be deprived of his compensation by the wrongful refusal of a commission or officer to attach the certificate required. If the law has been obeyed the necessary certificate cannot be withheld.<sup>83</sup>

If the amount is specified in the contract of employment this is controlling. *Hyde v. Brooklyn*, 21 How. Pr. (N. Y.) 339.

Sometimes the law prescribes the amount to be paid. *Devoy v. New York*, 39 Barb. (N. Y.) 169; *Mathewson v. Triff*, 14 R. I. 587.

See chapter relating to contracts in general, *post*.

82. *Paxon v. Holt*, 40 Cal. 466.

83. **Certifying to payrolls.** If a pay roll is presented to the civil service commission by the head of a department bearing the name of a person who is shown by the official roster of the commission to have been duly appointed to the position assigned to him on the pay roll, it is the duty of the commission to attach its certificate. The civil service commission has no power under civil service laws to make a rule under which it reserves the right

to refuse to certify the pay roll upon satisfactory evidence that an employee examined and certified for a position is performing duties not appropriate to the position. *People v. McWilliams*, 106 N. Y. S. 459, 56 Misc. Rep. 296.

Where a woman held the position of teacher in the public schools before the enactment, and at the time of the taking effect of the city charter which provided that teachers "should continue to hold their respective positions subject to removal for cause," the superintendent of schools cannot refuse, upon the marriage of such teacher, to certify her salary to the auditor of the board, though the by-laws of the school board provided that upon the marriage of a female teacher her place should become vacant. *People v. Maxwell*, 79 N. Y. S. 174, 39 Misc. Rep. 166.

Salaries required by the charter to be paid monthly need not be paid in cash, but warrants may be issued monthly therefor.<sup>84</sup>

Ordinarily a municipal officer is not authorized to withhold moneys collected by him in his official capacity in payment of his salary or compensation, and he is obligated to turn over the same to the city.<sup>85</sup>

Usually salaries are paid out of the funds created or revenue appropriated for the purpose.<sup>86</sup>

As mentioned in a prior section, sometimes officers and employees are entitled to compensation although no services were in fact performed by them in cases where they have been prevented, upon proof of their readiness and ability to perform the services incident to the office or employment.<sup>87</sup>

84. *Eidemiller v. Tacoma*, 14 Wash. 376, 44 Pac. 877.

85. *New Orleans v. Finnerty*, 27 La. Ann. 681, 21 Am. Rep. 569.

**Retention of money unauthorized.** One acting under a void appointment has no power to retain money collected by him as fees. *Wilder v. Chicago*, 26 Ill. 182; *Russell v. Chicago*, 22 Ill. 283; *Central v. Sears*, 2 Colo. 588; *Syracuse v. Reed*, 46 Kan. 520, 26 Pac. 1043; *New York v. Sands*, 39 Hun (N. Y.) 519.

86. **Funds to pay salaries.** The salary of a public officer which has been fixed by law is to be paid out of the general fund when there is sufficient money therein, without regard to revenues of separate years. *Harri-son v. Horton*, 5 Cal. App. 415, 90 Pac. 716.

The fact that the board of supervisors of the City and County of San Francisco had set apart

a special fund for juror's fees and that this fund was exhausted, is no defense to a *mandamus* to compel the auditor to draw his warrant upon the county treasurer for fees of jurors for each day's attendance at court. *Jack-son v. Bachr*, 138 Cal. 266, 71 Pac. 167.

87. *Stoddart v. New York*, 80 N. Y. S. 344, 80 App. Div. 254. § 520 *ante*, also § 534 *post*.

**Compensation of temporary employees.** Where persons eligible under civil service laws could not be obtained to fill positions as watchmen, and others were appointed to hold from day to day, until eligibles became available, the city will be liable for their wages, notwithstanding their retention violated the civil service rules limiting emergency appointments to one week and prohibiting successive appointments. *Gallagher v. New York*, 101 N. Y. S. 229, 115 App. Div.

Usually an officer cannot draw the salaries of two or more officers or positions,<sup>88</sup> and generally speaking, he is limited to the compensation fixed by law, notwithstanding he is required to perform other public duties to which fees may be attached.<sup>89</sup>

### § 532. Right to salary in case of absence.

Whether the salary or compensation of the office is lost to the incumbent in case of absence, without leave, will depend on the circumstances of the particular case and the controlling law.<sup>90</sup> Ordinarily, absence on account of

662; *Griffin v. New York*, 101 N. Y. S. 229, 115 App. Div. 662; *Trimmer v. New York*, 101 N. Y. S. 229, 115 App. Div. 662; *Bunee v. New York*, 101 N. Y. S. 229, 115 App. Div. 662.

88. *Redwood v. Grimmerstein*, 68 Cal. 515, 9 Pac. 562; *Gould v. Portland*, 96 Me. 125, 51 Atl. 820.

89. *Mundell v. Pasadena*, 87 Cal. 520, 25 Pac. 1061.

**Compensation in two positions.** Where the law directs that a city marshal shall be appointed constable and requires the marshal to turn over all fees collected by him for the city he must also turn over all fees received as constable. *Worcester v. Walker*, 9 Gray (Mass.) 78.

Where the law does not forbid a city marshal may contract for and receive a reward for services in the detention and conviction of a murderer in another place. *Bronnenberg v. Coburn*, 110 Ind. 169, 11 N. E. 29.

Under a law providing that a city marshal "shall receive the same fees as sheriffs and constables in similar cases" the mar-

shal cannot recover fees against the county in which the city is located. *Christ v. Poke Co.*, 48 Iowa 302; *Guanelle v. Pottawatamie Co.*, 84 Iowa 36, 50 N. W. 217.

**Who liable.** Ordinance provided compensation should be paid by those who requested the work; as city is not liable. *Locker v. Central*, 4 Colo. 65, 34 Am. Rep. 66.

**When city liable.** *Baker v. Utica*, 19 N. Y. 326; *In re Opening Hudson Ave.*, 6 Hun (N. Y.) 356.

**Compensation can be received only as provided**, as from persons benefited by services, e. g., city patrolmen, inspector. *Brophy v. Marble*, 118 Mass. 548.

**City engineer, particular case.** *Roberts v. Lincoln*, 6 Neb. 352.

90. *Whitney v. New York*, 7 Jones and S. (39 N. Y. Super. Ct.) 106.

**Salary in case of absence.** "No officer shall receive any salary during the time he is absent from the city without leave." *Mun. Code of St. Louis* (McQuillin, 1901), § 1589.

sickness or other disability will not deprive the officer of his salary,<sup>91</sup> but a different rule is usually applied to a mere employee.<sup>92</sup>

Under the St. Louis charter the salary of the mayor cannot be suspended during his absence from the city, although the charter provides that the officer acting as mayor "shall receive the same compensation of mayor." *Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439.

An employee who is laid off or put on half time in order to keep salaries within an appropriation therefor cannot recover for time lost. *Driscoll v. New York*, 77 N. Y. S. 997, 38 Misc. Rep. 453.

Under statutes providing for a deduction from the wages of members of the street cleaning department taking a leave of absence an application for such leave is a waiver of compensation for time absent. *Tepidino v. New York*, 98 N. Y. S. 693, 50 Misc. Rep. 324.

A statute providing for an annual furlough to police officers, will not deprive such officers whose salary is fixed by law at a certain sum per annum of the right to full pay. *Carney v. Whelan*, 147 Mich. 15, 110 N. W. 128, 13 Det. Leg. N. 955.

Forfeiture on account of absence of members of council, under particular law. *Barron v. Kaufman*, 131 Ky. 642, 115 S. W. 787.

Leave of absence and vacation, § 510 *ante*.

91. When sickness does not bar. *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156;

*Devlin v. New York*, 41 Hun (N. Y.) 281.

A city marshal is entitled to his salary for the time during which he is sick and unable to perform the duties of his office. *Cavanev v. Milan*, 99 Mo. App. 672, 74 S. W. 408.

92. Employees lose salary when absent without leave. Under statutes of New York, employees of the street department, who are absent without leave are not entitled to compensation, for time absent, though such absence is due to an injury received in the service. *Rogers v. New York*, 105 N. Y. S. 172, 120 App. Div. 513.

A carpenter in the civil service whose wages depended upon the performance of actual services, who was absent for eighteen months owing to injuries received in an assault upon him committed by a fellow-servant cannot recover wages for the time he was absent. *Conlin v. Board of Education*, 88 N. Y. S. 210, 43 Misc. Rep. 125.

An examiner of records, an employee, being sick, was notified prior to his recovery of his discharge because of his inability to work. Held that he was entitled to no pay while not at work and although he was paid for part of the time he was absent that did not entitle him to payment for the remainder, such payment being a matter of grace. *Neal v. New Haven*, 83 Conn. 151, 76 Atl. 543.

§ 533. Salary after expiration of term.

The right to recover a salary after the expiration of the term of office where the officer continues to perform the duties because no successor has been selected to fill the office is controlled by the circumstances of the particular case and the law applicable.<sup>93</sup> If the law, in express terms, or by necessary implication, permits the officer to serve until his successor is duly elected or appointed, and qualified—which is the usual rule, as

Veterans in the civil service who are not officers or incumbents of offices to which a salary is attached, cannot recover wages for time lost during sickness. *Eckerson v. New York*, 80 N. Y. S. 168, 80 App. Div. 12.

93. Salary after expiration of term. No compensation is recoverable by an officer after his term expires on the ground that he is the *de facto* officer and no successor has been selected to fill the office. *Miller v. Seiney*, 81 Ga. 489, 8 S. E. 423.

One who holds over under the law after the expiration of his term because a successor has not been selected is entitled to salary where he performs the duties of the office. *Taylor v. New York*, 67 N. Y. 87.

One who performs service after his term of office has expired cannot recover for such service or for expenses in that behalf. *Atchison v. Owensboro*, 24 Ky. L. Rep. 1529, 71 S. W. 864.

Where a policeman ceases to be an officer *de jure* he is entitled to salary only for services actually rendered by him and accepted by the city. *Houston v. Albers*, 32 Tex. Civ. App. 70, 73 S. W.

1084; *Beverly v. Hattiesburg*, 83 Miss. 342, 35 So. 876.

A former city attorney is not entitled to expense incurred or compensation for services rendered in going to Washington after his term had expired to assist his successor in office in the United States Supreme Court in a case which he successfully defended through the state courts during his term of office. *Atchison v. Owensboro*, 24 Ky. L. Rep. 1529, 71 S. W. 864.

A city attorney entitled by law to a percentage of judgments for the city obtained during his term is entitled to such percentage on judgments obtained by him during his term but which, owing to appeals, were not collected until after his term. *Atchison v. Owensboro*, 24 Ky. L. Rep. 1529, 71 S. W. 864.

Where a captain of police is permitted to remain in office and serves as such he is entitled to his salary, even though his tenure is voidable and he could be ousted by proceedings brought for that purpose by the attorney general. *Toole v. Ogden*, 80 N. Y. S. 584.

elsewhere explained,—<sup>94</sup> clearly the officer holding over who, in good faith, performs the duties appertaining to the office, is legally entitled to the salary belonging thereto.

**§ 534. Action by officer or employee to recover salary or compensation.**

The usual legal remedies, of course, are open to the officer, to recover his salary or compensation, in event it is wrongfully denied him.<sup>95</sup> He may sue the municipal or other local public corporation duly obligated to pay him, for his salary, although he may have another form of relief.<sup>96</sup>

In Connecticut in a suit by assessors for compensation it is not necessary that all the assessors should join in one action, although the law makes the compensation for the whole service depend upon the sum of the assessment list.<sup>96a</sup>

A claim for salary earned by a municipal employee constitutes an indivisible cause of action and an assignment of part and a recovery thereof by the assignee in an action against the city is a bar to another action for the balance.<sup>97</sup>

94. § 487 *ante*.

95. *Morgan v. Denver*, 14 Colo. App. 147, 59 Pac. 619; *Macon v. Hays*, 25 Ga. 590; *King v. Buffalo*, 57 Hun (N. Y.) 586, 10 N. Y. S. 564; *De Camp v. Newark*, 78 N. J. L. 31, 73 Atl. 247; *Gabrecht v. Cincinnati*, 51 Ohio St. 68, 23 L. R. A. 609, 36 N. E. 782; *Hart v. Murray*, 48 Ohio St. 605, 29 N. E. 576.

96. *Marquis v. Santa Ana*, 103 Cal. 661, 39 Pac. 650.

**Corporation liable.** A police officer employed by the police commissioners appointed by the governor under authority of a stat-

ute providing that such officers shall be paid by the town, is entitled to recover for his services from the town. *Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100.

The Board of Education of the City of New York is a corporation against which a suit will lie for teacher's salaries. *Gunnison v. Board of Education, etc.*, 81 N. Y. S. 181, 80 App. Div. 480, affirmed in 68 N. E. 106.

96a. *Skinner v. Woodstock*, 25 Conn. 408.

97. *Hartman v. New York*, 89 N. Y. S. 912, 44 Misc. Rep. 272.



In order to establish a legal demand against a municipality or other public corporation for services rendered there must first be an employment by lawful authority.<sup>98</sup> That is, in an action to recover salary incident to an office or a position the plaintiff is bound to show that he was entitled to the office or position.<sup>99</sup>

98. *Graham v. New York*, 66 N. Y. S. 754, 33 Misc. Rep. 56; *Stenson v. New York*, 82 N. Y. S. 946, 40 Misc. Rep. 533.

99. *Bullis v. Chicago*, 235 Ill. 472, 474, 85 N. E. 614; *Gillen v. Chicago*, 150 Ill. App. 207; *Walter v. New York*, 105 N. Y. S. 950, 119 App. Div. 464, affirmed 83 N. E. 48; *Murtagh v. New York*, 94 N. Y. S. 308, 106 App. Div. 98.

**Conditions of recovery—proof.**

A civil service employee who is not entitled to the position cannot, upon being discharged, recover on a *quantum meruit* in an action for salary. *Deering v. New York*, 107 N. Y. S. 934; *Graham v. New York*, 66 N. Y. S. 754, 33 Misc. Rep. 56.

In an action by a policeman for salary, a showing, in the absence of proof that he was legally discharged, that he was duly appointed and qualified, that the amount of the salary was fixed and that it had not been paid, is sufficient to entitle him to recover. *San Antonio v. Serne*, 45 Tex. Civ. App. 341, 99 S. W. 875.

Where a municipal employee claims that a reduction in salary operated to remove him to a lower grade, he cannot recover the salary of the higher grade without first showing that the removal was set aside or that he was re-

instated. *Walters v. New York*, 94 N. Y. S. 308, 106 App. Div. 98.

Under charter providing that no warrant shall be drawn for salary to civil service employees who are not certified by the commission as having been appointed pursuant to civil service laws or that the position has not been classified, and his appointment was made under an emergency as authorized by law, the burden of proof, in an action to compel, the issuance of such warrant, is on the employee to show either an appointment under civil service rules, or that the position has not been classified and he was appointed under an emergency. *MacDonald v. Lane*, 49 Ore. 530, 90 Pac. 181.

Where the city accepted the services of a janitor under a contract of employment, without objection, it is legally bound to pay for them whether the contract is valid or not. *Skinner v. Manchester*, 72 N. H. 299, 56 Atl. 313.

For services as commissioner of deeds in taking affidavits of persons having business with the bureau of buildings of the City of New York the law implies an obligation to pay unless the services are rendered gratuitously or by an officer or employee as a part of his regular services. A messenger of the city who acted

Thus one establishing his title to an office by contest on being commissioned is entitled to all salary and fees appertaining thereto with interest.<sup>1</sup> But although one may be legally entitled to an office if he takes no steps during the term to establish his title, ordinarily he cannot recover the salary appertaining to the office where the duties were performed by another who was paid by the municipal corporation.<sup>2</sup>

As mentioned, sometimes the officer or employee may recover his salary, although he performs no services, as where he is duly elected or appointed to the office or position and is ready and willing to discharge the appropriate duties, but is wrongfully prevented from so doing.<sup>3</sup>

as such commissioner made out a cause of action against the city when he showed such services were rendered outside of the time he was required to render official services to the city and that he had not been paid. *Morgan v. New York*, 121 N. Y. S. 976, 137 App. Div. 194.

1. *Philadelphia v. Rink* (Pa., 1886), 2 Atl. 505.

**Interest.** A public officer who has by *mandamus* compelled the payment of the principal of his salary cannot afterwards maintain an action at law against the municipality out of whose funds such salary is payable to recover interest thereon. *Gordon v. Omaha*, 71 Neb. 570, 99 N. W. 242.

2. *Demarest v. New York*, 74 Hun (N. Y.) 517, 26 N. Y. S. 585, 147 N. Y. 203, 41 N. E. 405.

See § 518 *ante*.

3. See §§ 520, and 531 *ante*.

**Salary where no services are performed.** Where a police officer

of a city, duly appointed, is ready and willing to perform services, which are refused, he has a cause of action for the fixed daily rate of pay or salary. *French v. Lawrence*, 190 Mass. 230, 76 N. E. 730.

The right of a janitor, legally appointed, to recover from the city compensation for his services is not affected by the fact that another person was at the same time performing the same duties under a contract with the city. *Wiggins v. Manchester*, 72 N. H. 576, 58 Atl. 522.

Under a statute providing a *per diem* compensation "for every day of actual service" only, an officer who was prevented by the council from performing any services cannot recover compensation, though he was ready and willing to perform such services. *Stephens v. Old Town*, 102 Me. 21, 65 Atl. 115.

However, in such case, the plaintiff must establish all the essential elements necessary to recover.<sup>4</sup>

In actions of this character the corporation may plead and prove the usual defenses.<sup>5</sup>

### § 535. Same—mandamus.

*Mandamus* may be invoked by the officer or employee in appropriate cases, wherein no discretion is vested in the refusing authority, to compel payment of salary or compensation, or to compel the proper public authority to restore the name on the pay roll, or to make the required certificate, etc., as preliminary to secure the right to demand the salary.<sup>6</sup>

4. Where one makes a claim against the city for services not actually rendered, the burden is on him to show a time contract, and the authority of the one with whom it was made to make it. *McCloy v. St. Louis*, 6 Mo. App. 503.

5. Defenses illustrated. In a suit to recover extra compensation by virtue of a contract the city is not estopped from pleading an ordinance showing that the interest demanded exceeds the amount prescribed therein. *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532.

Defense in suit by assessors. *Kathman v. New Orleans*, 11 La. Ann. 116.

Defense in particular suit by *de jure* officer. *McVeany v. New York*, 1 Hun (N. Y.) 35, reversed 80 N. Y. 185, 36 Am. Rep. 600.

Suit by *de jure* officer after judgment establishing his rights to office. *People v. Nolan*, 101 N. Y. 539, 5 N. E. 446.

§ 518 *ante*.

When vacancy is raised as an issue. *King v. Buffalo*, 57 Hun (N. Y.) 586, 10 N. Y. S. 564.

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The title to a position in the civil service cannot be tried in an action for salary. *Deering v. New York*, 107 N. Y. S. 934; *Eckerson v. New York*, 80 N. Y. S. 168, 80 App. Div. 12; *Walters v. New York*, 105 N. Y. S. 950, 119 App. Div. 464.

Statute of frauds. A verbal contract by which a city employs a city engineer for a period of one year is not within the statute of frauds where it is not shown that the work to be done could not be performed within one year. *Decatur v. McKean*, 167 Ind. 249, 78 N. E. 982.

Limitation. Where a corporation counsel has no authority to approve a claim for administering oaths, his approval thereof cannot take it out of the statute of limitations. *Sheahan v. Chicago*, 226 Ill. App. 115, 80 N. E. 754, affirming 127 Ill. App. 626.

6. *Lewis v. Widher*, 99 Cal. 412, 33 Pac. 1128; *Marquis v. Santa Ana*, 103 Cal. 661, 37 Pac. 650; *Speed v. Detroit*, 100 Mich. 92, 58 N. W. 638; *McBride v. Grand*

## 10. LIABILITIES OF OFFICERS.

## § 536. General rules as to liability of public officers stated and illustrated.

The general rule is that a municipal officer is not liable to private action for his acts done in the honest performance of his corporate duties.<sup>7</sup>

Rapids, 47 Mich. 236, 10 N. W. 353.

*Mandamus* to compel payment of, will lie. *Richmond v. Epps*, 98 Va. 233.

*Mandamus* will lie to compel the mayor to sign an order requiring the city treasurer to pay a city officer for additional services rendered by him for the city. *State v. Vasaly*, 98 Minn. 46, 107 N. W. 818.

A police officer who has been promoted to captain is entitled to a writ of *mandamus* to compel the civil service commissioners to certify his promotion on the pay roll. *People v. Ogden*, 84 N. Y. S. 73, 41 Misc. Rep. 246.

The discretionary power of a mayor to refuse to sign warrants for the salaries of city officers will not be interfered with by *mandamus*. *Rudolph v. Hutchinson*, 134 Wis. 283, 114 N. W. 453.

*Mandamus* will not be awarded to compel the restoration of the name of a *de facto* officer to the pay roll. *McNeill v. Chicago*, 212 Ill. 481, 72 N. E. 450, affirming 93 Ill. App. 124.

A policeman irregularly assigned to special duties is not entitled to *mandamus* to compel the civil service commission to certify his name on the pay roll. *Stone*

*v. Civil Service Commission*, 71 N. Y. S. 1054, 63 App. Div. 273.

An employee who has been reinstated in his position by the department of education "subject to the civil service rules and regulations" which require him to pass an examination is not entitled to *mandamus* to compel certification of the pay roll on which his name appeared where he failed to pass the examination. *People v. Knox*, 73 N. Y. S. 361, 66 App. Div. 517.

To prevent reduction of salary in certain cases. Where a city council vested with power to fix the salary of the city auditor at a sum not to exceed \$1200 per year, reduced such salary to \$300 per year in an illegal attempt to abolish the office the court will upon *mandamus* brought require the salary restored to \$900 per year, the lowest reasonable salary for the office. *Thurmond v. Shreveport*, 124 La. 178, 50 So. 3.

7. *Smith v. Stephens*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; *Cooley on Torts* (2d Ed.), §§ 448, 449.

**Governmental duties.** Usually officers are not liable in connection with the performance of governmental duties. *Worley v. Columbia*, 88 Mo. 106; *Caldwell v. Prunelle*, 57 Kan. 511.

In considering the liability of public officers, some courts draw certain distinctions. Thus according to some decisions *mere omission to discharge official duty* or *non-feasance*, usually creates no liability; that is, in such case, none is implied, and it exists only when expressly given by statute. But the discharge of official duty accompanied by wilful negligence, malice or corruption, which in the view of the law constituting *misfeasance*, creates a personal liability in favor of the public or the person suffering damage. So the doing of an act which the officer ought not to do at all, e. g., beyond the scope of his authority, constituting *malfeasance* creates personal liability. Some courts do not appear to make any distinction in this respect.<sup>8</sup>

**Impeachment will not lie.** A constitutional provision making the governor and all other executive officers liable to impeachment is not applicable to officers elected by towns. *Lowery v. Central Falls*, 23 R. I. 284, 354, 50 Atl. 639.

**Gratuitous act.** It is said that no action can be maintained against any man acting gratuitously for the public for the consequences of any act which he was authorized to do, and which, so far as he is concerned, is done with care and attention; such person is not liable for the negligent execution of an order properly given by him. *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649; *Hall v. Smith*, 2 Bing. (Eng.) 156.

**8. Nonfeasance, misfeasance, and malfeasance defined.** "*Non-feasance* is the omission of an act which a person ought to do; *mis-feasance* is the improper doing of an act which a person might lawfully do; and *malfeasance* is the doing of an act which a person

ought not to do at all." *Bell v. Josselyn*, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741, per Metcalf, J.

**Mere neglect of duty** in the absence of proof of malice will not ordinarily render the officer personally liable. *Thompson v. Evans*, 49 Ill. App. 289.

**Selectmen of a town** are not liable for failure of duty. *Sears v. Tyler*, 92 Mass. 469.

**Measure of liability for neglect.** *Maxim, Nullum tempus occurrit regi*, applied in modified form. *Greer v. New York*, 4 Rob. (27 N. Y. Super. Ct.) 675, 680.

**Question of implied warranty.** *Robinson v. Bishop*, 39 Hun (N. Y.) 370.

**Omission of duty.** Where it was the duty of a building commissioner to enforce from builders obedience to the requirements of the city ordinances, he is liable to one for injuries caused by the falling of a building constructed in a careless and grossly negligent manner. *Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44.

Liability is created frequently by statute. But the repeal of a statute which makes officers criminally and

**Omission of duty—statutory liability.** Where the law provides that boards of commissioners of towns shall publish a statement annually of the taxes levied and collected in the town, together with a statement of the amount expended by them, and for what purpose, and fixed a penalty for failure to make such publication, a board was held liable for such failure to make the publication as required by statute, although their successors in office, within a reasonable time after the election, made the publication for them. *Roberts v. Southern Pines*, 125 N. C. 172, 34 S. E. 268.

**Failure to execute process.** A police officer cannot justify his failure to execute a warrant for the arrest of a person for a crime, by showing that the magistrate issuing the warrant orally requested him not to serve it though such fact may be shown in mitigation. *People v. McAdoo*, 90 N. Y. S. 669, 98 App. Div. 190.

**Return of process.** In order to justify under a writ, an officer must make due return as commanded by its terms unless such return is waived by the defendant. *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. 451.

**Corruption.** Liability attaches if the officer acts corruptly. *Baker v. State*, 27 Ind. 485.

Where the board of local improvements corruptly allows a contractor to use inferior materials

in the improvement of streets the members of such board are personally liable to a landowner whose property is specially assessed for such improvement. *Gage v. Springer et al.*, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191, reversing 112 Ill. App. 103.

City engineer not liable unless he acts wilfully and maliciously. *St. Joseph ex rel. v. McCabe*, 58 Mo. App. 542.

**Liability for wrongful collection of fee.** If an officer collects an illegal fee he is personally responsible therefor, and the fact that he has paid the illegal fees into the city treasury does not excuse him. *Townshend v. Dyckman*, 2 E. D. Smith (N. Y.) 224.

**Statutory penalty.** Petition for statutory penalty for neglect to publish financial statement. *Borker v. Pheps*, 39 Mo. App. 288.

**Defense.** Payment of illegal fees—no defense that officer acted as agent. *Townshend v. Dyckman*, 2 E. D. Smith (N. Y.) 224.

**Miscellaneous illustrations.** *Jarvis v. Barnard*, 30 Vt. 492, distinguishing *Lyman v. Woridsor*, 24 Vt. 575, 29 Vt. 305.

Will sometimes be held personally liable for abuse of power. *Sherlock v. Winnetaka*, 68 Ill. 530.

Liability of superintendent of workhouse for false imprisonment. *St. Louis v. Karr*, 85 Mo. App. 608.

Regulations for prisoners prop-

civilly liable for neglect of duty does not affect the common-law action.<sup>9</sup>

Ordinarily, the officer will not be exempt from liability if he *fails to perform positive duties enjoined by law*; nor will he be exempt if he discharges them in a negligent, wrongful, malicious, or corrupt manner whereby damage to the public, or to individuals result.<sup>10</sup> However, in those jurisdictions which announce liability for non-performance, the rule usually applied is that it must be shown that the officer failed to perform some duty imposed upon him by law.<sup>11</sup>

Generally the officer is liable for injuries due to his commission of some *act entirely outside of the scope of his official duty* whereby the city and individuals suffer damage.<sup>12</sup> So sometimes an officer will be held liable for the injurious consequences of his *discretionary acts when he exceeds his authority*.<sup>13</sup>

er. *Ulrich v. St. Louis*, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372.

*Mandamus. Jones v. Currie*, 34 La. Ann. 1093.

9. *Hanlon v. Partridge*, 69 N. H. 88, 44 Atl. 807; *Bennett v. Whitney*, 94 N. Y. 302.

10. *Kansas. McCarty v. Bauer*, 3 Kan. 237.

*Kentucky. Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585.

*Maine. Rounds v. Mansfield*, 38 Me. 586.

*Montana. Merritt v. McNally*, 14 Mont. 238, 36 Pac. 44.

*New York. Bennett v. Whitney*, 94 N. Y. 302.

11. *Fitzpatrick v. Slocum*, 89 N. Y. 358.

12. *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847,

64 Am. St. Rep. 737; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

13. *Craig v. Burnett*, 32 Ala. 728.

**Liability in awarding contracts.** There is no liability to bidder for failure to award contract to the lowest bidder as the law directs. The liability of the officers is alone to the public. *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557, affirming 25 Hun 614.

Where a board of public works has discretion as to awarding contracts for public work the members thereof cannot be personally liable for rejecting without exception all bids and advertising anew. *American Artificial Stone Pavement Co. v. Wagner*, 139 Pa. St. 623, 21 Atl. 160.

Under a variety of circumstances the general principle has been often asserted by the courts that where a public officer is by law vested with discretionary ministerial powers, and he acts within the scope of his authority, he is not liable in damages for an error in judgment, unless guilty of corruption or wilful violation of the law. He is not liable for an honest mistake.<sup>14</sup> But where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. A mistake as to his duty and honest intentions will not excuse the offender.<sup>15</sup>

Laws usually require the officer to give bond for the faithful performance of his official duties, and the city may recover in event the conditions of the bond are not fulfilled.<sup>16</sup>

A statute rendering municipal corporations liable to parties injured by the illegal acts or defaults of its officers does not impliedly exempt the officers from personal liability therefor.<sup>17</sup> Officers seeking to justify their acts by authority of the city can do so only to the extent that the city might do so.<sup>18</sup> The fact that the charter of a city is a local law does not, in contemplation of law, render it a private act so as to take from its officers their public

14. *Knox Co. v. Hunolt*, 110 Mo. 67, 19 S. W. 628; *Williams v. Elliott*, 76 Mo. App. 8; *Edwards v. Ferguson*, 73 Mo. 686; *Reed v. Conway*, 20 Mo. 22; *Schoettgen v. Wilson*, 48 Mo. 253; *Albers v. Merchants' Exchange*, 138 Mo. 140, 39 S. W. 473; *Washington Co. v. Boyd*, 64 Mo. 179; *Pike v. Megoun*, 44 Mo. 491; *Dritt v. Snodgrass*, 66 Mo. 286.

**Delegation of ministerial acts.** By taking proper precautions a municipal officer may delegate to a clerk or assistant the performance of purely ministerial duties.

*State v. Reber*, 226 Mo. 229, 126 S. W. 397.

15. *St. Joseph School Board v. Hull*, 72 Mo. App. 403; *St. Joseph Fire Ins. Co. v. Leland*, 90 Mo. 177; *McCutcheon v. Windsor*, 55 Mo. 149; *Knox Co. v. Hunolt*, 110 Mo. 67, 19 S. W. 628; *Chouteau v. Rowse*, 56 Mo. 65.

16. *St. Louis Charter*, art. IV, § 43.

§§ 546, 547 *post*.

17. *Rounds v. Mansfield*, 38 Me. 586.

18. *Wamesit Power Co. v. Allen*, 120 Mass. 352.



character, and those immunities which such officers have by law.<sup>19</sup>

Usually the officer will not be held personally liable for damages caused by his preventing or abating a nuisance if he acts in a proper manner.<sup>20</sup> But if he fails to observe the law, and acts in an unauthorized, malicious or corrupt manner, liability attaches.<sup>21</sup> The liability of public officers is further illustrated in view of particular facts, in the cases in the notes.<sup>22</sup>

19. *Graves v. McWilliams*, 1 Pinn (Wis.), 491.

20. *Privett v. Whitaker*, 73 N. C. 554.

21. *Arkansas. Harvey v. De-woody*, 18 Ark. 252.

*Georgia. Prudent v. Love*, 67 Ga. 190.

*Missouri. Clay v. Board*, 85 Mo. App. 237.

*New York. Coddington v. White*, 2 Duer (N. Y.) 390.

*Canada. Logan v. Hurlburt*, 23 Ont. App. 628.

**Personal liability.** Mayor not personally liable for removing awning maintained in violation of ordinance. *Heald v. Lang*, 98 Mass. 581.

No action will lie against a mayor for forbidding the erection of a building contrary to ordinance provisions. *Privett v. Whitaker*, 73 N. C. 554.

Officers may be made personally liable by statute or charter for failure to comply with legal requirements. Such regulations are held not to be in the nature of fines or excessive punishments but in the nature of damages in consequence of a failure to discharge an official duty. *Porter v. Thomson*, 21 Iowa 391.

22. **Indebtedness in excess of limit.** Under statutes empowering cities to purchase or condemn property for the purpose of donating same to a railroad company, and requiring a petition to the council and a popular vote on the question of donation, city officials are not personally liable to the city for an indebtedness thus contracted in excess of the constitutional limitation, where the proceedings were regular. *Lough v. Estherville*, 122 Iowa 479, 98 N. W. 308.

**Interest on money.** An officer failing to pay over money at the time required may be charged with interest thereon from such time. *Sheridan v. Van Winkle*, 43 N. J. L. 125.

**Money received by officer from void sale of property** may be recovered from such officer, although placed in city treasury, for such is an unauthorized act on the part of the officer. *Hergo v. San Francisco*, 33 Cal. 134.

**Loss of interest on funds.** Where a city treasurer deposits city funds in a bank other than the one designated by charter he is liable to the city in an action for loss of interest on such funds and the city is not restricted to

### § 537. Personal liability for negligence.

An officer in charge of work for a municipal corporation who selects the place for the employees to work and invites and directs them to work there has the duty of seeing that the place is reasonably safe and he may be liable for an injury to a workman consequent upon a

an action on his official bond. *New Haven v. Frenesius*, 75 Conn. 145, 52 Atl. 823.

And such right of action is not affected by the fact that the board of finance knew of the deposit in such bank. *New Haven v. Frenesius*, 75 Conn. 145, 52 Atl. 823.

**Police commissioners.** Appointing one under void law, as policeman, commissioners not personally liable. *Welker v. Heinz*, 16 Ill. App. 326.

Police commissioners liable for dereliction of official duty, when displaced by a superior power. *Baltimore v. Harvard*, 20 Md. 335.

**Police.** Where, under a rule of the police department, a sergeant of police is required to act as captain, possessing all the powers of a captain, such sergeant is as much responsible for a neglect of captain's duties as the captain would be himself. *People v. Greene*, 93 N. Y. S. 720, 104 App. Div. 496.

**Arrest—trespass.** Where a ute provides for confinement in the county, of one arrested on mesne process in a civil action, an officer who imprisons such person in another county is a trespasser *ab initio*. *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. 451.

**Trespass.** Liability to private individual as per trespass, acting

without ordinance. *Clay v. Board*, 85 Mo. App. 237, 241, 242.

The officers of a school district may be liable for trespass though the school district as such is not. *School District v. Williams*, 28 Ark. 454.

Evidence in action of trespass. *Gay v. Bradstreet*, 49 Me. 580, 77 Am. Dec. 272; *Chilson v. Wilson*, 38 Mich. 267.

**Allowing or authorizing nuisances.** Officers will not be liable for the location of a market house to adjacent property owners or residents on the ground that such market house is a nuisance, where it does not appear that the market house was established under corrupt motives. *Walker v. Hallock*, 39 Ind. 239.

Officers are not liable for authorizing the establishment of a stone crusher at which plaintiff's horse took fright and ran away on the ground that the stone crusher was a nuisance. *Bates v. Horner*, 65 Vt. 471, 22 L. R. A. 824, 27 Atl. 134.

**Liability of officers for costs of suits.** Usually municipal officers will not be held personally liable for costs of actions where they are passed over in their representative capacity. *Farmers Loan & Trust Co. v. Newton*, 97 Iowa 502, 66 N. W. 784.

failure to perform such duty.<sup>23</sup> So, too, a municipal officer may render himself liable to third persons damaged by the negligent or unskilful manner in which he performs his duty; the fact that the work was done by him in his official capacity will not relieve him.<sup>24</sup>

Where a statute imposes a penalty upon an officer for negligent or wilful misconduct, the common law right of action therefor of one specially damaged is not affected.<sup>25</sup> Likewise, a charter provision declaring its officers liable for all damages "sustained by reason of wilful neglect," does not impair the common law right of action of an individual against such officer for simple negligence.<sup>26</sup>

The silence of a member of a municipal legislative body when a measure is being adopted by that body does not lend his assent thereto, and does not render him liable as a joint tortfeasor for tortious acts done in pursuance thereof.<sup>27</sup>

But in one case where the city officers in violation of law increased the corporate debt beyond the limits allowed they were held personally liable for the costs of a suit brought to enjoin them from doing so. *Scott v. Alexander*, 23 S. C. 120.

23. A road commissioner, though not obliged to furnish a derrick for the use of men employed by him on street work, yet having done so, is bound to exercise reasonable care in seeing that it is safe, and so maintained, and is liable for a failure to do so. *Bowden v. Derby*, 97 Me. 536, 55 Atl. 417, 63 L. R. A. 223, 94 Am. St. Rep. 516.

*Breen v. Field*, 157 Mass. 277, 31 N. E. 1075, holding that the fact

the town might be made liable does not excuse the officers.

24. *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

In Canada it has been held that where a municipal officer fails to follow the plain directions of an act of Parliament and loss thereby arises to the municipality, that such officer would seem to be liable therefor. *Christie v. Johnston*, 12 Grant Ch. (Up. Can.) 534.

25. *Hanlon v. Partridge*, 69 N. H. 88, 44 Atl. 807.

See *Rives v. Columbia*, 80 Mo. App. 173.

26. *Bennett v. Whitney*, 94 N. Y. 302.

27. *Carle v. De Soto*, 63 Mo. App. 161.

The San Francisco charter exempts the city from liability for defective condition of sidewalks, and puts the liability upon the officers whose duty it is to repair the same for any neglect of theirs.<sup>28</sup>

Personal liability of public officers for damages resulting from public work. The general rule is that municipal officers while acting in good faith, within the scope of their authority and without negligence, are not personally liable to individuals damaged in the construction of public improvements.<sup>29</sup>

In some instances they have been held personally responsible. Thus in a California case the superintendent of streets was held liable for damages caused by his negligence in repairing a sewer.<sup>30</sup> So in a Michigan case a street commissioner was held liable for damages resulting from his removal of the lateral support for adjacent land.<sup>31</sup> So in a Rhode Island case a surveyor, who acted recklessly or maliciously in the discharge of his duties was held personally liable for damages resulting from such wrongful act. Here it was said that in fixing new grades the surveyor was bound to exercise discretion with due regard to the public convenience and safety and was likewise bound to respect private rights.<sup>32</sup>

28. *Taylor v. Manson*, 9 Cal. App. 382, 99 Pac. 410.

29. *Iowa*. *Theulen v. Viola Township*, 139 Iowa 61, 117 N. W. 26.

*Massachusetts*. *Proctor v. Stone*, 158 Mass. 564, 33 N. E. 704.

*New York*. *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, affirming 56 Hun 293, 9 N. Y. S. 557.

*North Carolina*. *Tate v. Greens-*

*boro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671.

*Ohio*. *Scovil v. Geddings*, 7 Ohio (Part 2) 211.

*South Carolina*. *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540.

30. *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

31. *Buskirk v. Strickland*, 47 Mich. 389, 11 N. W. 210.

32. *Round v. Mumford*, 2 R. I. 154.

The cases in the note indicate more fully the circumstances under which public officers have been adjudged liable by the courts.<sup>33</sup>

### Failure to keep highways in reasonably safe condition.

The rule was early announced in New York that officers whose duty it is to keep the streets in repair, with ample means for this purpose, are liable to any person specially injured as a result of their negligent performance of that

33. **Public works.** A change of grade of street without authority will render officers personally liable for damages. *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22.

A corporation and not the officers is liable for damages resulting from public work. *Squiers v. Neenah*, 24 Wis. 588.

An officer is not liable for the wrongful act of one doing work for the city unless he authorized the act. *Bacheller v. Pinkham*, 68 Me. 253.

Commissions created by law to grade and bridge a highway and borrow money and issue bonds therefor, held personally liable to a contractor. *Paulding v. Cooper*, 10 Hun 20, affirmed 74 N. Y. 619.

Bridge trustees held not liable for injury resulting from inadequate police. *Hannon v. Agnew*, 96 N. Y. 439.

Officers held not liable under particular circumstances. *Gay v. Bradstreet*, 49 Me. 580, 77 Am. Dec. 272; *Bacheller v. Pinkham*, 68 Me. 253; *Proctor v. Stone*, 158 Mass. 564, 33 N. E. 704; *Atwater v. Candauigua*, 124 N. Y. 602, 27 N. E. 385, 56 Hun (N. Y.) 293, 9 N. Y. S. 557; *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649.

An officer who aided a con-

tractor in entering upon a street and lowering the grade thereof without sufficient authority from the city, is a joint tortfeasor with the contractor, and a subsequent ordinance authorizing the work cannot validate the wrong. *Faust v. Pope*, 132 Mo. App. 287, 111 S. W. 878.

The fact that an ordinance makes the city liable for damages from street grading, does not relieve the officers from liability for participating in unlawful action relative thereto. *Rives v. Columbia*, 80 Mo. App. 173.

**Liability of officer for acts of employees.** Under statutes making the superintendent of streets liable to the same penalties as those imposed upon surveyors, such superintendent is liable only for personal negligence for injuries caused by blasting rock, and not for the negligence of his servants. *Moynihan v. Todd*, 188 Mass. 301, 74 N. E. 367; *Toomey v. Todd*, 188 Mass. 301, 74 N. E. 367.

In the absence of negligence on his part a municipal officer is not liable for the negligence of workmen employed by him on public work. *Bowden v. Derby*, 97 Me 536.

duty, or a failure to perform it.<sup>34</sup> And in Oregon a charter provision that the city shall not be liable to any one for loss or injury growing out of any casualty or accident happening to such person on account of the condition of any street or public ground therein, does not exempt officers from liability for their negligence in the performance of their duties.<sup>35</sup>

In other jurisdictions failure to perform such duty *when imposed by law*, with adequate means, creates a personal liability against the officers in favor of persons damaged.<sup>36</sup> Thus, where by its charter a municipal corporation is declared not to be liable for damages resulting from the defective condition of its streets, and provides that any officer who by his "wilful neglect" of any duty enjoined by law causes such damage is liable, a failure on the part of the council which constitutes a wilful neglect of duty to provide by ordinance for the repairs of streets renders the members of the council personally liable to one who is damaged by reason thereof.<sup>37</sup>

In other states liability in like, or similar circumstances, has been denied.<sup>38</sup>

34. *Piercy v. Averill*, 37 Hun (N. Y.) 360.

Compare *Bartlett v. Crosier*, 17 John. (N. Y.) 439.

35. *Rambin v. Buckman*, 9 Ore. 253.

36. *California*. *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707, culvert left in dangerous condition.

*Iowa*. *Sells v. Dermody*, 114 Iowa 344, 346, 86 N. W. 325, duty imposed by statute. Cases are reviewed.

*Maryland*. *Anne Arundel County Comrs. v. Duvall*, 54 Md. 350, duty created by statute. Many cases are considered.

*North Carolina*. *Hathaway v.*

*Hinton*, 1 Jones Law 243, per Battle, J. (N. C.)

*Oregon*. *Mattson v. Astoria*, 39 Ore. 577, 87 Am. St. Rep. 687, 65 Pac. 1066, charter provision exempting officers, held void.

37. *Balls v. Woodward*, 51 Fed. 646.

38. *Illinois*. See *Gage v. Springer*, 211 Ill. 200, 103 Am. St. Rep. 191, 71 N. E. 860, reversing 112 Ill. App. 103, wherein certain distinctions are mentioned.

*Indiana*. *Lynn v. Adams*, 2 Ind. 143, denying private action against a supervisor for failure to keep a bridge in repair.

*Massachusetts*. *Moynihan v. Todd*, 188 Mass. 301, 108 Am. St.

In New York it has been said that, while it is necessary in some cases, to hold an officer whose duty it is to repair the highways for damages resulting from a defective street, to show that he had adequate means to make the repairs, if the case is founded upon a *misfeasance* instead of *nonfeasance*, such a showing is unnecessary.<sup>39</sup>

### § 538. Personal liability on contracts.

Public and municipal officers are not personally liable on contracts within the scope of their authority and line of duty, unless it is manifest that they intended to bind themselves personally.<sup>40</sup> Thus a public officer or agent

Rep. 473, 74 N. E. 367, treating subject fully, and declaring liability for personal *misfeasance*.

*Nebraska.* McConnell v. Dewey, 5 Neb. 385, denying action at common law.

*New Hampshire.* Waldron v. Berry, 51 N. H. 136, per Sargent, J.

*New York.* Bartlett v. Crozier, 17 Johns 439, reversing 15 Johns 250, wherein Chancellor Kent said: "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not gratuitous, or coerced, but voluntary and attended with compensation and where the duty to be performed is entire, absolute and perfect."

*Ohio.* Dunlap v. Knapp, 14 Ohio St. 64, no liability for failure to repair bridge.

*Vermont.* Daniels v. Hathaway, 65 Vt. 247, 21 L. R. A. 377, 26 Atl. 970, denying liability of town selectmen.

The mayor and members of the council are not personally liable in damages for an improper exer-

cise of discretion in failing to repair a defective bridge within the city. Gray v. Batesville, 74 Ark. 579, 86 S. W. 295.

When commissioners not liable for dangerous condition of bridge, see Fitzpatrick v. Slocum, 89 N. Y. 358.

39. Bennett v. Whitney, 94 N. Y. 302.

40. *Indiana.* Newman v. Sylvester, 42 Ind. 106.

*Missouri.* Tutt to use v. Hobbs, 17 Mo. 486; Hodges v. Runyan, 30 Mo. 491; McDonald v. Franklin County, 2 Mo. 217; Edwards v. Kirkwood, 147 Mo. App. 599, 127 S. W. 378; Jacquemin & Shenker v. Andrews, 40 Mo. App. 507.

*New Hampshire.* Brown v. Rundlett, 15 N. H. 360.

*New York.* Nichols v. Moody, 22 Barb. (N. Y.) 611; Hall v. Landerdale, 46 N. Y. 70; Miller v. Board, 15 N. Y. Misc. 322, 37 N. Y. S. 766.

*United States.* Parks v. Ross, 11 How. (U. S.) 362, 13 L. Ed. 730.

is not personally liable on negotiable instruments executed by him in his official capacity,<sup>41</sup> e. g., where the signers of a note made the promise "as trustees of school district."<sup>42</sup>

But if public officers in making contracts go beyond or exceed the authority given them, they may become personally liable.<sup>43</sup> Thus if an agent undertakes to contract on behalf of an individual or corporation and contracts in a manner which is not legally binding upon his principal he will be personally responsible, as he is presumed in such case to know the exact extent of his authority.<sup>44</sup> However, when an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, especially where the authority of the officer is prescribed by law, he will not become individually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority.<sup>45</sup> To illustrate:

41. *McGee v. Larramore*, 50 Mo. 425; *McClellan v. Reynolds*, 49 Mo. 312.

42. *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Lyon v. Adamson*, 7 Iowa 509.

43. *Ruggles v. Washington County*, 3 Mo. 496; *State v. Bank of Missouri*, 45 Mo. 528; *State ex rel. v. Hays*, 52 Mo. 578; *Blakely v. Bennecke*, 59 Mo. 193.

Acceptance of order to pay, without right to contract as public officer creates personal liability. *McCracken v. Lavalie*, 41 Ill. App. 573.

44. *Motts v. Hicks*, 1 Cowan (N. Y.) 513.

45. *Arkansas*. *First Nat. Bank v. Whisenhunt*, 94 Ark. 583, 127 S. W. 968.

*Connecticut*. *Ogden v. Raymond*, 22 Conn. 379.

*Illinois*. *Dimcan v. Niles*, 32 Ill. 532.

*Indiana*. *Newman v. Sylvester*, 42 Ind. 106.

*Louisiana*. *Southworth v. Flanders*, 33 La. Ann. 190.

*Maine*. *Fuller v. Mower*, 81 Me. 380, 17 Atl. 312.

*Michigan*. *Lyon v. Irish*, 58 Mich. 518, 25 N. W. 502.

*Missouri*. *Edwards v. Kirkwood*, 147 Mo. App. 599, 127 S. W. 378.

*New Hampshire*. *Lawrence v. Toothaker*, 75 N. H. 148, 71 Atl. 534.

*Vermont*. *Stone v. Huggins*, 28 Vt. 617.

Personal liability not anticipated. If the officers of a public corporation acting officially enter into a contract under an innocent mistake of law, in which the other



Where commissioners of highways, in a proceeding to lay out a highway, being unable to agree with a land owner as to the damages he would sustain submitted the matter of damages to arbitration, and executed their bond in their individual names containing an express covenant to abide by and perform the award (they having no power to bind their town in this manner) it was held that they were not individually liable on such bond.<sup>46</sup>

Officers may by their acts render themselves personally responsible. Thus if a public officer engages that he will be responsible for the payment of certain charges, e. g., the support of a pauper, and credit is given on his personal promise he will be liable.<sup>47</sup> So, in one case three selectmen signed their individual names to a paper with the designation as selectmen of the town, offering a reward for the apprehension and conviction of a person who shot a citizen of the town and were adjudged personally liable. The official designation was held not to relieve them of the personal liability created by their individual signatures.<sup>48</sup> However, an offer of reward for the apprehension and conviction of persons guilty of robbing a county treasury signed by order of the county board of supervisors, by the chairman thereof, is not the act of the individual members of the board for which they are individually and personally liable, but is an act done by them in their official capacity only; and the fact that the board had no authority to offer such reward so as to

contracting party equally participates, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable; and the same rule applies to the officers of a public body which is not a corporation. *Humphrey v. Jones*, 71 Mo. 62; *Michael v. Jones*, 84 Mo. 578.

Committee to build bridge, held personally liable on contract with

contractor. *Simonds v. Heard*, 23 Pick. (40 Mass.) 120, 34 Am. Dec. 41.

46. *Mann v. Richardson*, 66 Ill. 481, 485.

47. *Ives v. Hulet*, 12 Vt. 314; *King v. Butler*, 15 Johns. (N. Y.) 281.

48. *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430, 15 L. R. A. 509, 30 N. E. 85.

bind the county does not render the members thereof personally liable.<sup>49</sup>

### § 539. Liability for loss of public funds.

The judicial decisions are not uniform on the question of the liability of the public officer for loss of public funds intrusted to his care. Where the liability is not made as the construction of charter or statutory provision applicable, or, of the terms of the official bond, the officer is regarded either as the debtor of the local corporation and in this capacity is held liable for such funds irrespective of the cause of their loss,<sup>50</sup> or, as a trustee or bailee, not an insurer against loss and in this relation is liable only in cases wherein he acts without proper diligence, caution, prudence and good faith.<sup>51</sup>

The rule is thus stated in a Colorado case: "We believe the true rule is that a public officer who receives money by virtue of his office is a bailee and that the

49. *Huthsing v. Bousquet*, 2 McCrary 152, W. S. C. C. 3 Ib. 569.

In *Lee v. Trustees of Flemmingsburg*, 7 Dana. (Ky.) 28, the question is discussed whether the trustees of a town, offering a reward for the apprehension of a felon who had been guilty of homicide in the town, can bind the funds of the corporation for its payment; and if not they may perhaps be personally liable.

Officer as surety. Under a provision forbidding officers from becoming sureties on official bonds an officer who signs as such surety is not liable. *Fond du Lac v. Moore*, 58 Wis. 170, 15 N. W. 782.

50. Funds stolen without his fault. *Johnstown v. Rodgers*, 20

N. Y. Misc. 262, 45 N. Y. S. 661.

The officer is an insurer, except when the loss occurs by the act of God or the public enemy. *Adams v. Lee*, 72 Miss. 281, 16 So. 243.

51. *Alabama*. *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59.

*California*. *Healdsburg v. Muligan*, 113 Cal. 205, 33 L. R. A. 461, 45 Pac. 337.

*Maine*. *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *Strout v. Pennell*, 74 Me. 262.

*South Carolina*. *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675.

*Tennessee*. *State v. Copeland*, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844.

extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provision his duty and liability is measured by the law of bailment. If a more stringent obligation is desired it must be prescribed by statute. That his official bond does not extend such obligation, but its office is to secure faithful and prompt performance of his legal duties.”<sup>52</sup>

Some cases rest the liability upon the broad ground of public policy, and thus hold the officer absolutely responsible without condition. The reason is thus advanced in a New York case: “It shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents itself, and it may well be asked whether it is not wiser to subject a custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.” Therefore, in that case a supervisor was adjudged liable for public moneys lost by the failure of a private bank in which he had deposited the money, although it appeared that the officer acted in good faith and without negligence.<sup>53</sup>

In actions on official bonds in cases involving the loss of public funds liability is made absolute, without reference as to how the loss occurred. It was early held by the Supreme Court of the United States that public funds

52. *Wilson v. People*, to use of Pueblo & A. V. R. Co., 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449.

Liability increased by legal provision. *McClure v. LaPlatte Commissioners*, 19 Colo. 122, 34 Pac. 763; *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119.

Failure of bank. Ratification of  
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act of treasurer in making deposit by council may be shown.

*Lansing v. Wood*, 57 Mich. 201, 23 N. W. 769. Settlement, when no bar to action. *People v. Cooper*, 10 Ill. App. 384.

53. *Tillinghast v. Merrill*, 157 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678.

stolen from an officer without his fault who was under bond to "keep safely" must be returned by the officer.<sup>54</sup> Numerous rulings of a like nature have been made in similar cases in many states.<sup>55</sup> In a later case the Supreme Court of the United States held that where the loss occurred by the act of God or the public enemy the officer would be excused.<sup>56</sup> The court stated the distinction between an absolute agreement to do a thing and a condition to do the same thing inserted in a bond.<sup>57</sup>

54. *United States v. Prescott*, 44 U. S. (3 How.) 578, 11 L. Ed. 734.

55. *Arkansas. State v. Croft*, 24 Ark. 560.

*California. Contra, Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461.

*Iowa. Lowry v. Polk Co.*, 51 Iowa 50, 33 Am. Rep. 113.

*Louisiana. State v. Lanier*, 31 La. Ann. 243.

*Massachusetts. Hancock v. Hazard*, 12 Cush. 112, 59 Am. Dec. 171.

*Minnesota. Redwood County Comrs. v. Tower*, 28 Minn. 45, 8 N. W. 907.

*Mississippi. Adams v. Lee*, 72 Miss. 281, 16 So. 243.

*Missouri. State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *State v. Gates*, 67 Mo. 139; *State v. Rubey*, 77 Mo. 610.

*Montana. Jefferson County Comrs v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 562.

*Nebraska. Ward v. Colfax County*, 10 Neb. 293, 35 Am. Rep. 477.

*Nevada. State v. Nevins*, 19 Nev. 162, 3 Am. St. Rep. 873.

*North Carolina. Havens v. Lathene*, 75 N. C. 505.

*Ohio. State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363.

*United States. United States v. Dashiell*, 4 Wall. (71 U. S.) 182, 18 L. Ed. 319; *United States v. Morgan*, 11 How. (52 U. S.) 154, 13 L. Ed. 643; *Boyden v. United States*, 13 Wall. (80 U. S.) 17, 20 L. Ed. 527.

56. *United States v. Thomas*, 82 U. S. (15 Wall.) 337, 21 L. Ed. 89.

57. "The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt nor is it evidence of a debt, and the duty secured thereby does not become a debt until default is made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is not to pay a debt but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes." *United States v. Thomas*, 82 U. S. (15 Wall.) 337, 21 L. Ed. 89.

§ 540. Liability for wrongful disbursement of public funds.

Where funds are disbursed illegally by public officers or upon their authority, they are personally liable therefor.<sup>58</sup> And such an act of a public officer cannot be legalized by the council.<sup>59</sup> But it has been held that where an officer allowed and directed the paying out of money on warrants appearing on their face to be legal and which were properly audited and certified and an appropriation for their payment had been made, he was not liable although the warrants were illegal.<sup>60</sup> Nor is the officer liable for disbursements made in good faith. Thus where by statute a certain society is entitled to funds coming into the hands of the officer from fines imposed for the commission of offenses, he is not liable for paying them in good faith to another officer of the city before a demand by the society.<sup>61</sup> So, too, where the members of a legislative body of a city act honestly in directing a payment to be made from a certain fund when it should be paid from a different fund, they are not liable.<sup>62</sup> If a municipal officer employs a clerk and gives him power to handle the funds of the city and pay out money without the warrant of the mayor, such officer is liable for his misconduct in the office.<sup>63</sup>

The fact that funds expended illegally were expended for a useful purpose is no defense to an action for their

58. *Arkansas*. Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193.

*Kentucky*. Duncan v. Combs, 131 Ky. 330, 115 S. W. 222.

*Michigan*. People v. Bender, 36 Mich. 195.

*Nebraska*. Blair v. Lantry, 21 Neb. 247, 31 N. W. 790.

*Canada*. Patchell v. Raikes, 7 Ont. L. Rep. 470, 3 Ont. Wkly. Rep. 487.

59. *East St. Louis v. Flannigan*, 34 Ill. App. 596.

60. *Barnes v. Kaufman*, 131 Ky. 642, 115 S. W. 787.

61. *American S. P. C. A. v. Doyle*, 65 How. Pr. (N. Y.) 459.

62. *Little Valley v. Ayres*, 2 N. Y. S. 691; *King v. Matthews*, 5 Ont. L. Rep. 228, 2 Ont. Wkly. Rep. 18.

See § 545 *post*.

63. *New Orleans v. Blache*, 6 La. 500.

recovery against the officer who disbursed them wrongfully.<sup>64</sup>

### § 541. Issuing and disposing of invalid paper.

The disposition of invalid bonds by false representation by public officers will create a personal liability.<sup>65</sup> Thus if an officer fraudulently sells invalid municipal bonds he is liable to the municipal corporation for the proceeds.<sup>66</sup> But an officer who acts lawfully and in good faith in the conduct of the affairs of his office is not liable for a fraud practised by another officer, although without some previous action on his part the latter could not have practised the fraud.<sup>67</sup>

In one case an officer was authorized by law to issue certain bonds upon receipt of a verified certificate of another officer that the requisite formalities had been observed, and properly he was held not liable for issuing bonds without the required consent of the taxpayers, where it appeared that he acted in good faith.<sup>68</sup>

### § 542. Wrongful tax levy.

A municipal officer may render himself liable for levying a tax on property for a purpose for which that property is not subject to taxation.<sup>69</sup> And in such case a void ordinance is no justification to the officer who under-

64. *McCracken v. Soucy*, 29 Ill. App. 619.

65. *Robinson v. Bishop*, 39 Hun (N. Y.) 370.

66. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784, reversing 39 Hun 22.

67. *Fuller v. Mower*, 81 Me. 380, 17 Atl. 312.

68. *Ontario v. Hill*, 99 N. Y. 324, 1 N. E. 887.

See *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784, 39 Hun 22.

69. *Higgins v. Ansmuss*, 77 Mo. 351.

Indemnity from liability may be given to officers as tax collector. *Pike v. Middleton*, 12 N. H. 278.

Liable for trespass in collecting taxes not authorized by charter, although by-law authorizes. *Bergen v. Clarkson*, 6 N. J. L. 352.

Applying funds to a purpose other than that for which the tax was levied—statutory provision. *Duncan v. Coombs*, 131 Ky. 330, 115 S. W. 222.

takes to impose a tax provided for by such ordinance.<sup>70</sup> In an early Massachusetts case, assessors who authorized a tax to raise money to be used by the town for a purpose not warranted by law under an authorized act of the town were adjudged liable for trespass to the individuals whose property was taken to pay such illegal tax; and this, notwithstanding there may have been included in such assessments other sums lawfully voted and raised by the town.<sup>71</sup>

§ 543. Failure to cause municipal obligations to be satisfied.

After demand upon and refusal by municipal officers to levy a tax to pay a judgment, it being their duty and in their power to make such levy, such officers are personally liable for the judgment.<sup>72</sup> But if the taxing power is exhausted for that year they will not be liable for a refusal to levy, and no liability will attach until there is no legal impediment in the way of making the levy.<sup>73</sup> It has been held in Louisiana that, in order to recover from an officer on a judgment against the municipal corporation to enforce which *mandamus* was granted, and which was placed on the budget of expenditures, it is necessary to show (1) that the fund to pay the judgment was raised, that (2) it was diverted, and that (3) the creditor has sustained loss and injury.<sup>74</sup>

As we have seen, a public officer may create a personal liability by accepting and promising to pay an order drawn on him in his official capacity.<sup>75</sup> Likewise, if he promises to pay a contractor in corporate bonds and

70. *Bergen v. Clarkson*, 6 N. J. L. 352.

71. *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

72. *Porter v. Thomson*, 22 Iowa 391; *Oswald v. Thedinga*, 17 Iowa 13.

73. *Porter v. Thomson*, 22 Iowa 391; *In re Isaacson*, 36 La. Ann. 56.

74. *Jones v. Currie*, 34 La. Ann. 1093.

75. *McCracken v. Lovalle*, 41 Ill. App. 573.

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fails to deliver them liability arises, since he either contracted in excess of his power, or with sufficient funds and suffered them to be appropriated to other purposes. The fact that the contract contained a clause providing that the officer should not be held to any individual liability whatever would not, in the opinion of the court, affect the right of recovery.<sup>76</sup>

#### § 544. Unlawfully removing another from office.

The assumption of authority by a municipal officer in removing another officer from office, will not usually render him liable in damages, especially if it appears that he acted in good faith and followed a precedent formerly established at the instance, and for the benefit of, the officer whom he attempted to remove.<sup>77</sup> But if an officer assumes power and removes another officer from office illegally, he may be liable personally if it is done without authority and no justifying facts accompany the act.<sup>78</sup>

#### § 545. Liability for legislative acts.

Members of a municipal legislative body are not liable for damages consequent upon the passage of an ordinance which they have authority to pass.<sup>79</sup> Nor ordi-

76. *Paulding v. Cooper*, 10 Hun (N. Y.) 20.

77. *De Armas v. Bell*, 109 La. 181, 33 So. 188.

78. Officer as mayor personally liable for illegal removal of chief of police. *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

79. **Non-liability of councilmen.** Councilmen are not liable for repealing an ordinance applicable to the corporation because of failure to comply with the terms thereof. *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 So. 856.

Members of the legislative body are not liable either civilly or criminally for acts done by them as members in the exercise of their discretionary powers in the absence of corrupt action. *Baker v. State*, 27 Ind. 485.

When the mayor presides, but is not part of the council, he is not liable for signing an ordinance exceeding the council's jurisdiction. *Sylvester v. Macauley*, 1 Wils. (Ind.) 19.

The mayor and members of the council cannot be made personally liable for the passage of an ordinance reducing the emoluments



narily can their motives be inquired into in enacting such ordinance.<sup>80</sup>

Municipal legislative officers while acting in their official capacity are acting on behalf of the public; their acts represent the public will and their duty is solely to the public. They are not liable for an injury to an individual resulting from their acts done in good faith as officers of the public, even though such acts are wholly without authority of law and void for that reason.<sup>81</sup>

### § 546. Action on official bonds.

It is held in some jurisdictions that there is a liability under the bond of an officer only for breaches of the bond by acts done *virtute officii*, and that there is none for acts done *colore officii*.<sup>82</sup> However, it is said that the sureties may be liable if they assented to the action that made the loss possible.<sup>83</sup>

of a police judge, nor because the mayor directs the police force to institute proceedings for violations of ordinances before justice of the peace and thus deprive the police judge of emoluments. *McHenry v. Sneer*, 56 Iowa 649, 10 N. W. 234.

80. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508; *Freeport Borough v. Marks*, 59 Pa. St. 253.

81. *Lough v. Estherville*, 122 Iowa 479, 98 N. W. 308.

**Void ordinance.** They are not liable for the passage of an ordinance beyond their authority, for such an ordinance is void, and need not be obeyed or respected by any one. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508.

In one case the council ordered an improvement on a street not within the corporate limits, under a mistake of fact. The contractor was also mistaken and had the same opportunity to know as

the council. Held, the contractor could not hold liable the council. *Newman v. Sylvester*, 42 Ind. 106.

**Silence of member of council creates no liability.** *Carle v. De Soto*, 63 Mo. App. 161.

82. *California*. *San Jose v. Welch*, 65 Cal. 358, 4 Pac. 207.

*Illinois*. *Orton v. Lincoln*, 156 Ill. 499, 41 N. E. 159, reversing 56 Ill. App. 79; *East St. Louis v. Lautz*, 20 Ill. App. 644; *Linch v. Litchfield*, 16 Ill. App. 612.

*Oklahoma*. *Lome v. Guthrie*, 4 Okla. 287, 44 Pac. 198.

*Pennsylvania*. *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177, 33 Atl. 269, 30 L. R. A. 393, 50 Am. St. Rep. 795.

*Texas*. *Gold v. Campbell*, Tex. Civ. App. (1909), 117 S. W. 463.

83. *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177, 33 Atl. 269, 30 L. R. A. 393, 50 Am. St. Rep. 795.

In other jurisdictions it is the law that the sureties are liable under the bond for acts of the officer done by him *colore officii* in the line of his official duty, although such acts are illegal.<sup>84</sup> "By an official act is not meant a lawful act of the officer; \* \* \* if so, the sureties would never be responsible. It means *any act done by the officer in his official capacity, under color and by virtue of his office.*"<sup>85</sup>

The conflict of authority is only as to acts done *colore officii*, for of necessity the sureties are liable for acts done *virtute officii*, where the bond is broken thereby.<sup>86</sup>

**84. Indiana.** *Armington v. State*, 45 Ind. 10; *State ex rel. v. Flynn*, 3 Blackf. 72, 23 Am. Dec. 380.

**Iowa.** *Clancy v. Kenworthy*, 74 Iowa 740, 35 N. W. 427.

**Mississippi.** *State v. McDaniel*, 78 Miss. 1, 27 So. 994, 50 L. R. A. 118, 84 Am. St. Rep. 618; *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 23 So. 388, 71 Am. St. Rep. 512, and note; *Wilcox v. Williamson*, 61 Miss. 310; *Bigham v. State*, 59 Miss. 529.

**New Jersey.** *Seiple v. Elizabeth Borough*, 27 N. J. L. 407.

**Ohio.** *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202.

**Tennessee.** *McLendon v. State* to use of *Kennedy*, 92 Tenn. 520, 21 L. R. A. 738, 22 S. W. 200.

**West Virginia.** *Wheeling v. Black*, 25 W. Va. 266.

**Individual capacity.** Though, of course, for acts done by the officer in his individual capacity, the sureties are not liable. *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202; *Carson v. Dezarne*, 28 Ky. L. Rep. 761, 90 S. W. 281.

**85. Turner v. Sisson**, 137 Mass. 191; quoted in *State v. McDaniel*, 78 Miss. 1, 27 So. 994, 50 L. R. A. 118, 84 Am. St. Rep. 618.

*Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412, given at length in 42 Am. Rep. 648, 650, note, where it is said that "the jurisdictional test as the measure of judicial responsibility should be rejected," and further: "It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be that the particular case was not, by any form of proceeding, put under his authority."

**86. California.** *Lawrence v. Doolan*, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

**Georgia.** *Anderson v. Blair*, 118 Ga. 211, 45 S. E. 28.

**Indiana.** *Hunt v. State*, 124 Ind. 306, 24 N. E. 887.

**Michigan.** *Stevenson v. Bay City*, 26 Mich. 44.

**Montana.** *Philipsburg v. Degenhart*, 30 Mont. 299, 76 Pac. 694.

**Nebraska.** *Hrabak v. Dodge*, 62 Neb. 591, 87 N. W. 358.

The fact that the officer is merely a *de facto* officer does not affect the liability of the sureties. And where the bond recited that the officer had been appointed collector of street assessments, and the condition was that he should well and truly pay such collections to the city treasurer, the sureties are estopped from denying that he is a *de facto* officer.<sup>87</sup>

*New Jersey.* Van Valkenbergh v. Paterson, 47 N. J. L. 146.

Acts constituting breach of bond. Violation of duty by making an unauthorized disposal of bonds in his possession is a breach of the bond. Stevenson v. Bay City, 26 Mich. 44.

Officer withholding funds from his successor which it was his duty to turn over, is breach. Great Falls v. Hank, 21 Mont. 83, 52 Pac. 785.

Surety liable for failure of officer to pay over funds to successor occurring within a reasonable time after the expiration of his term, where the bond guarantees faithful performance of his duties for a specified time and until his successor is appointed. Camden v. Greenwald, 65 N. J. L. 458, 47 Atl. 458.

The purpose of these bonds is generally for the true and faithful performance of all official duties as prescribed by law, and for the true and faithful accounting for all money received as such official, and to turn over the balance.

Under these provisions the following have been held to constitute breaches of the bond:

Procuring the payment of money to himself by the city when nothing was due him. Armington v. State, 45 Ind. 10.

Drawing a warrant in favor of a creditor or bearer, securing the money and appropriating it to his own use. Greenville v. Anderson, 58 Ohio St. 463, 51 N. E. 41.

Making an unlawful arrest. Connelly v. American Bonding, etc. Co., 113 Ky. 903, 24 Ky. L. Rep. 714, 69 S. W. 959.

Failure to index registry of a mortgage. Daniell v. Grizzard, 117 N. C. 105, 23 S. E. 93.

Making levy on the goods of one person where the execution was against the goods of another. Frenkenstein v. Cummsky, 46 N. Y. Misc. Rep. 485, 92 N. Y. S. 708.

Failure to pay over taxes as required by law. Anderson v. Blair, 118 Ga. 211, 45 S. E. 28.

A bond covering all administrative duties of an office, includes acts of the second assistant done in the scope of the administration. Butler v. Milwaukee, 119 Wis. 526, 97 N. W. 185.

A bond conditioned for the faithful discharge of his official duties by a city clerk is broken only by a failure to properly perform such duties, though the terms of the bond are much more comprehensive. Lowe v. Guthrie, 4 Okl. 287, 44 Pac. 198.

87. Hoboken v. Harrison, 30 N. J. L. 73.

Sureties on a general bond are not liable for a defalcation of the officer in a special fund, where it is required by statute that a special bond relative to the handling of the particular fund be given. In such a case the officer is not trusted on faith of the general bond but only by virtue of the bond required to be given in the particular instance.<sup>88</sup>

A bond of a municipal official, general in its term, and covering the entire administrative duties of his office, covers and includes all *acts of his deputies and assistants* done within the scope of their authority the same as if performed by the officer personally, although he might have been ignorant of their conduct.<sup>89</sup>

88. *Broad v. Paris*, 66 Tex. 119, 18 S. W. 342.

89. *Butler v. Milwaukee*, 119 Wis. 526, 97 N. W. 185.

**Acts covered by bond.** The bond of a city clerk covering the entire administrative duties of his office includes all acts done within the scope of the administration by his second assistant. *Butler v. Milwaukee*, 119 Wis. 526, 97 N. W. 185.

Under a provision in a marshal's bond that the marshal shall well and truly discharge all the duties of his office, a surety is liable for an unjustifiable killing by the marshal of a person whom he had under arrest. *Growbarger v. U. S. Fidelity & Guar. Co.*, 31 Ky. L. Rep. 555, 102 S. W. 873, 11 L. R. A. (N. S.) 758.

The sureties on the bond of a marshal conditioned, as required by statute, for the faithful performance of duties, and against making an unlawful arrest, or an unnecessary assault on any person in making an arrest, are not liable for the act of the marshal

in recklessly killing a person when such killing was not done in the performance of any duty. *Carson's Admr. v. De Zarne*, 28 Ky. L. Rep. 761, 90 S. W. 281.

Moneys received by a city treasurer, which were collected by city officers from gambling houses and brothels, were received by him by virtue of his office, though they were collected illegally and without authority, and his failure to pay over same to his successor is a breach of his official bond for which the sureties are liable. *Philipsburg v. Degenhart*, '30 Mont. 299, 76 Pac. 694.

Under the laws of California a superintendent of streets is liable on his official bond for injuries received by a traveler in falling over an unguarded embankment on a street on which improvements were being made. *Merritt v. McFarland*, 4 Cal. App. 390, 88 Pac. 369.

#### Defenses.

*Georgia.* *Anderson v. Blair*, 121 Ga. 120, 48 S. E. 951.

The sureties on the bond of an official undertake to stand responsible for the good and faithful performance of his official duties or the duties devolving upon him by virtue of his office. Hence, it makes no difference whether a duty was required by the law at the times of the execution of the bond or was imposed by a law enacted subsequent to the execution of the bond; in either case the liability is the same.<sup>90</sup>

### § 547. Same subject.

The bond covers acts of the official during the term for which he is appointed or elected,<sup>91</sup> and usually not acts

*Illinois.* East St. Louis v. Renshaw, 153 Ill. 491, 38 N. E. 1048; East St. Louis v. Lautz, 20 Ill. App. 644.

*Kansas.* Manley v. Atchison, 9 Kan. 358.

*Louisiana.* Natchitoches v. Redmond, 28 La. Ann. 274.

*Maryland.* State v. Fahey, 108 Md. 533, 70 Atl. 218.

*Michigan.* Stevenson v. Bay City, 26 Mich. 44.

*New Jersey.* Newark v. Stout, 52 N. J. L. 35, 18 Atl. 943.

*Ohio.* Greenville v. Anderson, 58 Ohio St. 463, 51 N. E. 41.

*Limitation.* Grinishaw v. Wilmington, 5 Del., ch. 183.

Law forbid defendant from becoming surety. Fond du Lac v. Moore, 58 Wis. 170, 15 N. W. 782.

Embezzlement, amounts taken were commissions. Butte v. Cohen, 9 Mont. 435, 24 Pac. 206.

Issuance of certificates without authority—good faith is no defense. Hoboken v. Evans, 31 N.

J. L. 342. Municipality induced and was privy to misconduct. Newark v. Dickerson, 45 N. J. L. 38.

In an action by a sergeant of a city on the bond of his deputy for failing to remit collections made by him, the sergeant cannot recover from the surety, if he knew that the deputy was failing to remit such collections and failed to inform the surety of such fact. But such sergeant is not obliged to make continuous and diligent search into collections made by the deputy. American Bonding Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

90. Lawrence v. Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159; Orman v. Pueblo, 8 Colo. 292, 6 Pac. 931; State v. Grizzard, 117 N. C. 105, 23 S. E. 93.

91. Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633; Detroit v. Weber, 29 Mich. 24; Hoboken v. Kamena, 41 N. J. L. 435.

done by him during any previous term he held the office.<sup>92</sup> However, the time during which the bond is effective must be ascertained from the terms of the bond itself, and if it provides for subsequent terms of office, the conduct of the officer during such terms is, of course, covered.<sup>93</sup>

Where a treasurer was elected for a certain year and the bond covered his conduct, by its terms, "for the present year," the sureties were held liable for misappropriation of money coming to his hands as treasurer after the expiration of the year during a time when the treasurer was holding over.<sup>94</sup> So, too, if the bond covers the official's term of office which the law provides is for one year and until his successor qualifies, the sureties are liable until the successor qualifies.<sup>95</sup>

If the bond is for the accounting for all money that comes into the hands of a secretary as such, and recites

92. *Detroit v. Weber*, 29 Mich. 24; *Hoboken v. Kamena*, 41 N. J. L. 435.

**Period of bond.** If the bond is for a deputy it covers his acts during the term of the principal officer. *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. 633.

Where the term of office was one year and until his successor should be elected and qualified, and the bond recited that the officer "was at the last annual election, duly elected to the office for the next ensuing year," the bond covers his conduct during his current term, and not during twelve calendar months only. *Fond du Lac v. Moore*, 58 Wis. 170, 15 N. W. 782.

93. *Appeal of Waters*, 10 Wkly. Notes Cas. (Pa.) 146.

**Duration of bond.** It has been held that sureties on a bond are liable for the defalcation of a treasurer where the money was re-

ceived before the execution of the bond. *Sumter v. Lewis*, 10 Rich. (S. C.) 171.

But it is held that the sureties will not be liable for a defalcation occurring before the acceptance of the bond on behalf of the city, although the date of the bond is prior to the defalcation. *Grand Haven v. United States Fidelity, etc. Co.*, 128 Mich. 106, 87 N. W. 104, 92 Am. St. Rep. 446, 8 Det. Leg. N. 546.

Sureties held not liable under terms of the bond. *Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. 754.

94. *Cuthbert v. Brooks*, 49 Ga. 179.

95. *Grand Haven v. United States Fidelity, etc. Co.*, 128 Mich. 106, 87 N. W. 104, 92 Am. St. Rep. 446, 8 Det. Leg. N. 546; *Baker City v. Murphy*, 30 Ore. 405, 42 Pac. 133, 35 L. R. A. 88; *Wheeling v. Black*, 25 W. Va. 266.

that he has been appointed to serve until his successor should be appointed and qualified, it covers an incumbency of the office growing out of a holding over for a second term without a reappointment.<sup>96</sup>

96. *Laurium v. Mills*, 129 Mich. 536, 89 N. W. 362, 8 Det. Leg. N. 1083.

Liability held to extend reasonable time after the expiration of the term of office. *Camden v. Greenwald*, 65 N. J. L. 458, 47 Atl. 458.

**Liability on bond—construction.** The provisions of the charter relating to the duties of an officer are read into his bond and are to be construed in connection with it. *Oakland v. Snow*, 145 Cal. 419, 78 Pac. 1060.

The designation of an officer in his bond as "auditor and *ex officio* assessor" instead of "auditor and assessor" is a harmless misdescription which does not affect the validity of the bond. *Oakland v. Snow*, 145 Cal. 419, 78 Pac. 1060.

A provision of an ordinance that the sureties on the bond of a policeman shall be responsible for fines imposed against him is merely declaratory of the legal effect of the instrument and not a prescribed condition of the bond. *Houston v. Estes*, 35 Tex. Civ. App. 99, 79 S. W. 848; *Houston v. Clark* (Tex. Civ. App. 1904), 80 S. W. 1198; *Houston v. Frazier* (Tex. Civ. App. 1904), 80 S. W. 1198.

A city attorney and his sureties are liable on his bond for a failure to pay over to the board of education taxes levied for educational purposes, where the statute requires him to do so. *Anderson v. Blair*, 118 Ga. 211, 45 S. E. 28.

The utmost good faith must be observed by the obligee in the bond of a public officer towards the surety, but mere negligence on the part of the obligee will not avoid the contract of suretyship. *American Bonding Co. v. Milstead*, 102 Va. 683, 47 S. E. 853.

**Unlawful arrest.** The bond of a marshal conditioned for the faithful performance of the duties required of him as marshal and collector and as may be required of him by law, is broad enough to cover an unlawful arrest or unnecessary and illegal punishment inflicted by him. *Commonwealth v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340.

A condition in the bond of a policeman that he should well and truly perform all the duties of his office required of him by law, covers an unlawful arrest. *Connelly v. American B. & T. Co.*, 24 Ky. L. Rep. 714, 69 S. W. 959.

**Constitutionality of law.** The sureties on the bond of an officer voluntarily executing the same cannot attack the constitutionality of a law making such bond a lien on real estate. *Mt. Vernon v. Kenlon*, 89 N. Y. S. 817, 97 App. Div. 191.

**Defense—ratification.** Where a city council has full power to make settlement with an outgoing treasurer, it may be shown in defense to a suit on his official bond for failure to account for certain

Where a bond was to cover the acts of an officer "during his continuance in said office," and the law required that such officer "hold his office for one year or until his successor is duly elected and qualified," the sureties were held liable for a defalcation of such officer during a second term in which he had succeeded himself and had failed to give bond for the latter term.<sup>97</sup>

It is held, however, that such contracts of surety are to be strictly construed and the extent of the liability of the surety is limited to that expressed in the bond, or necessarily implied from the words used. When he becomes bound for the acts of an officer whose term is fixed by law and such specific term is recited in the bond, subsequent general words will not extend the term or enlarge the obligation of the surety; and where it is provided that an officer shall hold over "until his successor is duly elected and qualified," it is only intended to cover a reasonable time which may be required for his successor to qualify, and the sureties are not liable for a term extending beyond this.<sup>98</sup>

funds, that certificates of deposit were turned over for such amount and such transfer was ratified by the council, although the bank afterwards failed. *Lansing v. Wood*, 57 Mich. 201, 23 N. W. 769.

97. *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001.

98. *Montgomery v. Hughes*, 65 Ala. 201; *Ballard v. Thompson*, 21 Wash. 669, 59 Pac. 517.

**Liability where officer succeeds himself.** Case holding that where an officer succeeds himself his sureties for the second term are bound by his previous official reports, and if a shortage is found at the expiration of the latter term, though the loss occurred during the former term, the sureties on the bond covering the sec-

ond term are liable therefor. *Cicero v. Grisko*, 240 Ill. 220, 88 N. E. 478, affirming 144 Ill. App. 564.

Sureties held liable under the bond in *Syracuse v. Roscoe*, 66 N. Y. Misc. Rep. 317, 123 N. Y. S. 403; *Cicero v. Hall*, 240 Ill. 160, 88 N. E. 476, affirming 144 Ill. App. 589; *United States Fidelity, etc. Co. v. Jasper*, Tex. Civ. App. (1909), 120 S. W. 1145; *Prentice v. Nelson*, 134 Wis. 456, 114 N. W. 830.

City entitled to interest on amount of defalcation. *Syracuse v. Roscoe*, 66 N. Y. Misc. Rep. 317, 123 N. Y. S. 403.

"Defalcation," meaning of. *Id.*

Sureties held not liable because act not part of the duties of the officer. *Sauer v. Madisonville*, 30 Ohio Cir. Ct. Rep. 681.



Mere irregularities or informalities in the bond or its execution will not render it invalid.<sup>99</sup> Nor does the mere failure to approve the bond affect the liability of the surety.<sup>1</sup> A bond which fails to meet the requirements of a statute may still be good as a common law bond.<sup>2</sup>

**Liability of surety on bond of members of board of public works** held to extend only to acts for which the members themselves would be liable. *Taylor v. Manson*, 9 Cal. App. 382, 99 Pac. 410.

**Surety for chief of police** held liable only for an act done by such officer under a claim of right to do it in his official capacity. *Gold v. Campbell*, Tex. Civ. App. (1909), 117 S. W. 463.

99. *Georgia*. *Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. 754.

*Illinois*. *Cicero v. Hall*, 240 Ill. 160, 88 N. E. 476.

*Kentucky*. *Connelly v. American Bonding, etc. Co.*, 113 Ky. 903, 24 Ky. L. Rep. 714, 69 S. W. 959.

*Mississippi*. *Gloster v. Harrell*, 77 Miss. 793, 123 So. 520, 27 So. 609.

*New Jersey*. *Hoboken v. Evans*, 31 N. J. L. 342.

**Mere surplusage in a bond** does not affect its validity. *Stadler v. Detroit*, 13 Mich. 346.

1. *State v. Frentress*, 37 Ind. App. 245, 76 N. E. 821.

**Approval after death of the surety** is sufficient. *Mowfray v. State*, 88 Ind. 324.

**Approval.** The surety cannot escape liability because the bond was approved by resolution instead of by ordinance. *Gloster v. Harrell*, 77 Miss. 793, 23 So. 520, 27 So. 609; *Warren v. Philips*, 30 Barb. (N. Y.) 646.

**A statutory provision** requiring the trustees to indorse their approval of the sureties upon the bond is directory merely, and a failure to follow its directions does not affect the bond. *Warren v. Philips*, 30 Barb. (N. Y.) 646.

**Late delivery.** The fact that the officer delivers the bond a few days late, does not relieve the surety. *Todd v. Perry*, 20 Up. Can. Q. B. 649.

2. *Anderson v. Blair*, 118 Ga. 211, 45 S. E. 28.

**A surety signed a blank bond** and the amount, conditions, etc., were filled in by the principal, held good. *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, reversing 2 Ill. App. 332.

**Sufficiency—irregularities.** A bond given under an ordinance covering the duties of an officer as provided by the ordinance which duties are in violation of a statute, is void. *Tuskaloosa v. Lacy*, 3 Ala. 618.

**The failure of the council** to make a record of the execution and acceptance of an official bond, will not prevent a recovery thereon, if it was in fact executed and accepted. *Growbarger v. U. S. Fidelity & Guar. Co.*, 31 Ky. L. R. 555, 102 S. W. 873, 11 L. R. A. (N. S.) 758.

**A condition in the bond** of a city treasurer to give an account, at the expiration of his term, of

Generally reference must be had to the provisions of the practice code in the particular state to ascertain in whose name an action on an official bond should be brought. In some jurisdictions the municipality may bring suit for the use of the party injured;<sup>3</sup> in others the action is brought by the obligee, sometimes the mayor, for the use of the injured party;<sup>4</sup> and in others, in the name of the person aggrieved.<sup>5</sup> A demand on the de-

all moneys coming into his hands and to pay to his successor the balance due the city thereon, is not a sufficient compliance with an ordinance requiring such bonds to be conditioned that the treasurer will truly and faithfully discharge all his official duties. (1901) *Hecht v. Coale*, 93 Md. 692, 49 Atl. 660.

3. *East St. Louis v. Flannigan*, 26 Ill. App. 449.

The municipality may bring suit against a defaulting treasurer and his sureties to recover license moneys collected by him. *Hrabak v. Dodge*, 62 Neb. 591, 87 N. W. 358.

4. *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770.

Where the office is created by statute, an action may be maintained, in the name of the state to the use of the corporate body, entitled to the fees or funds, on the official bond of any officer who has defaulted, or failed to properly account for the funds coming into his hands. *State to use v. Smith*, 65 Mo. 464; *State ex rel. v. O'Gorman*, 75 Mo. 370; *Salem Township v. Cunningham*, 45 Mo. App. 614; *State to use*

*v. Sappington*, 68 Mo. 454; *Cole County v. Dallmeyer*, 101 Mo. 57.

The joinder of the state is harmless error. *State v. Arrington*, 101 N. C. 109, 7 S. E. 652.

5. *Somerville v. Wood*, 129 Ala. 369, 30 So. 280; *Board of Education v. Quick*, 99 N. Y. 138, 1 N. E. 533.

**Parties.** City is not a necessary party. *Com. v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340.

One not a party to an official bond may maintain an action thereon only when such bond was given for his benefit. *Cushing v. Lickert*, 79 Neb. 384, 112 N. W. 616; *Barker v. Wheeler*, 71 Neb. 740, 99 N. W. 548.

In the absence of a contract made for his benefit a citizen can not maintain an action against the surety on an official bond, except by legislative authority. *Barker v. Wheeler*, 71 Neb. 740, 99 N. W. 548.

A statute providing for actions upon official bonds by any person damaged through the misconduct of an officer, refers only to bonds given under statutory authority. *Barker v. Wheeler*, 71 Neb. 740, 99 N. W. 548.

faulting officer is not a condition precedent to bringing suit on the bond.<sup>6</sup>

## § 548. Wrongful or negligent acts of subordinates.

Ordinarily public officers or agents acting within the scope of their public duties are not responsible for the *misfeasance* or wrongs, or for the *nonfeasance* or negligence or omissions of duty of their subordinates, or other

6. *Cicero v. Hall*, 240 Ill. 160, 88 N. E. 476.

But compare *Cameron v. Hicks*, 54 W. Va. 484, 64 N. E. 832.

Petition or complaint—necessary allegations.

*Alabama.* *Tuskaloosa v. Lacy*, 3 Ala. 618.

*Indiana.* *Mowbray v. State*, 88 Ind. 324.

*Kentucky.* *Connelly v. American Bonding, etc. Co.*, 113 Ky. 903, 24 Ky. L. Rep. 714, 69 S. W. 959; *Com. v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340.

*Oregon.* *Baker v. Murphy*, 30 Ore. 405, 42 Pac. 133, 35 L. R. A. 88.

*West Virginia.* *Cameron v. Hicks*, 54 W. Va. 484, 64 S. E. 832.

Measure of damages. A provision of the statute, that "the recovery against the principal and surety shall not be limited by the amount of the penalty named in the bond" will be read into an official bond in determining the liability thereon. *Growbarger v. U. S. Fidelity & Guar. Co.*, 31 Ky. L. Rep. 555, 102 S. W. 873, 11 L. R. A. (N. S.) 758.

In an action on the bond of a

marshal the sureties are liable for compensatory damages. *Commonwealth v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340.

Compensation—punitive. In an action on a marshal's bond for an unjustified killing of a person under arrest, punitive damages may be recovered as against the marshal, but only compensatory damages can be recovered of the surety. *Growbarger v. U. S. Fidelity & Guar. Co.*, 31 Ky. L. R. 555, 11 L. R. A. (N. S.) 758, 102 S. W. 873.

Only compensatory damages can be recovered against the sureties, in an action on the bond for a false arrest and for assault and battery. *Scott v. Commonwealth*, 29 Ky. L. Rep. 571, 93 S. W. 668; *Fidelity & Deposit Co. v. Commonwealth*, 29 Ky. L. Rep. 571, 93 S. W. 668.

The sureties on the bond of a police officer are not liable for more than compensatory damages under a statute authorizing a recovery against sureties on such bonds for a sum in excess of the penalty of such bond. *U. S. Fidelity & Guar. Co. v. Milstead*, 33 Ky. Law Rep. 186, 109 S. W. 375.

persons legally employed by and under them to aid them in the discharge of their official duties.<sup>7</sup>

But the officer may become liable, *e. g.*: if he directs or authorizes the wrong or fails to require his subordinates to follow prescribed regulations, or, sometimes, if he neglects to superintend properly the discharge of their duties or knowingly employs or retains unfit or improper persons. Thus if a municipal officer employs a clerk and gives him power to handle the funds of the city and pay out money without the warrant of the mayor, such officer is liable for his misconduct in the office.<sup>8</sup> Liability in such case, of course, will depend on the particular facts.

Many municipal charters and ordinance regulations, as well as statutes, applicable fix the responsibility on the officer or head of the department in express terms.<sup>9</sup>

#### § 549. Civil liability of local municipal judges.

It is universally held that judges of courts of superior and general jurisdiction are exempt from liability in

7. Throop, Pub. Off., § 592, quoting Judge Story; 1 Beach, Pub. Corp., § 210.

Liability of officers for acts of subordinates. A law which exempts officers from liability for the *malfeasance* or *nonfeasance* of any of their subordinates is valid and not violative of the doctrine of *respondeat superior* as the city, and not the officer, is the superior. Bielling v. Brooklyn, 120 N. Y. 198, 24 N. E. 389.

A board of water commissioners, which does not constitute a body corporate, is not liable, as such board, for negligence of employees of such department. Gross v. Board, etc. of Portsmouth, 68 N. H. 389, 44 Atl. 529.

See Montfort v. Wheelock, 78 Minn. 169, 80 N. W. 955.

A chief of police is not personally responsible for causing the arrest of one charged with violating an ordinance where he keeps within the jurisdiction of the subject-matter. Cottan v. Oregon City, 98 Fed. 570.

Held, in case of one acting gratuitously as a public officer that he is not personally responsible for the misconduct or *misfeasance* of his employees. Donovan v. McAlpin, 85 N. Y. 185, 39 Am. Rep. 649.

8. New Orleans v. Blache, 6 La. 500.

9. St. Louis Charter, art. IV, §§ 21, 34; Revised Code of St. Louis (1907, Woerner), pp. 354, 359; Municipal Code of St. Louis (1901, McQuillin), p. 391, § 105.

damages for judicial acts, even when such acts are in excess of their jurisdiction.<sup>10</sup> A distinction is made between acts done by them in excess of their jurisdiction and acts done by them in the clear absence of all jurisdiction over the subject-matter. As to a court of general jurisdiction, to escape liability, it seems that the act must have been done by the judge in his judicial capacity, that is, it must have been a judicial act. The judges of courts of inferior or limited jurisdiction are generally held to be liable in a private action for judicial acts which are both in excess and outside of that jurisdiction. And such jurisdiction is not presumed, but must be proved. This distinction is stated and explained by Judge Cooley.<sup>11</sup>

But this doctrine has been denied.<sup>12</sup> It is held that a justice of the peace, like a judge of a superior court, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing he had jurisdiction.<sup>13</sup>

The Supreme Court of Georgia, in denying the doctrine, says that in all cases where judges of courts of general jurisdiction are exempt from civil liability in damages for their judicial acts, presiding officers of courts of limited jurisdiction are likewise exempt. Therefore, in that case it was held that where the presiding officer of a municipal court judicially determines that a given ordinance is valid, though in fact it is void for want of authority in the municipal corporation to pass it, he will not be liable in damages to a person convicted in his court of violating such ordinance and punished under such ordinance by imprisonment, without having been given an opportunity to pay a fine, pro-

10. *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Randal v. Brigham*, 7 Wall. (U. S.) 523; Cooley on Torts (2nd Ed.), p. 489.

11. Cooley on Torts (2d Ed.), pp. 489-492.

12. *Thompson v. Jackson*, 93

Iowa 376, 27 L. R. A. 92, 95.

13. See *Bishop's Non-Contract Law*, § 783; *Bell v. McKinney*, 63 Miss. 187; *Henke v. McCord*, 55 Iowa 379; *Brooks v. Mangan*, 86 Mich. 576; *Clark v. Holdridge*, 58 Barb. (N. Y.) 61.

vided the court in which such person is convicted has jurisdiction of the subject-matter of the offense; but it is said *arguendo*, where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him.<sup>14</sup>

The English rule is that "no action will lie against the judge for any acts done or words spoken in his judicial capacity in a court of justice." "But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that, at the time of the alleged wrongdoing, some matter was before him in which he had jurisdiction (whereas, in the case of a superior court in is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter."<sup>15</sup>

In a Missouri case the doctrine is stated thus: "It is a cardinal principle of our jurisprudence that if an action be brought against a judge of a court of record for an act done in his judicial capacity, if he plead that he did it as judge of a court of record, this is a complete justification; and where a ministerial officer does an act or does a judicial act which is within his power and jurisdiction he is not liable in a civil action by any person injured by his said act unless it be proved that the act was wilful and malicious."<sup>16</sup>

14. Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630.

15. Webb's Pollock Torts, pp. 130, 139, 327-330.

16. Albers v. Merchant's Exchange, 138 Mo. 140, 164, 39 S. W. 473; Pike v. Megoun, 44 Mo. 491; Reed v. Conway, 20 Mo. 22; Schoettgen v. Wilson, 48 Mo. 253; Wertheimer v. Howard, 30 Mo. 420; Stone v.

Graves, 8 Mo. 149; Edwards v. Ferguson, 73 Mo. 686; Lenox v. Grant, 8 Mo. 254; Scott v. Fishplate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696.

Where one directs a police officer to arrest any one who shall violate a certain ordinance, such act is not judicial. Bolton v. Vel-lines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

### § 550. Criminal liability of municipal officers, agents and servants.

Laws properly prescribe criminal liabilities against municipal officers, subordinates, agents and persons in public station, for intentional violations of law, crimes and misdemeanors and corruption.<sup>17</sup> It is sometimes held that a municipal officer is subject to indictment and criminal prosecution for the violation of a *specified public duty* although not so provided by statute.<sup>18</sup>

17. *Morris v. People*, 3 Denio (N. Y.) 381.

Criminal liability exists by statute for obtaining money from city not lawfully due. *State v. Crowley*, 39 N. J. L. 264.

Asking reward or promise for official act. Mayor not liable for obtaining increase of officer's salary and taking increase. *People v. Kalloch*, 60 Cal. 116.

The Constitution of New York provides that an officer impeached shall also be liable to indictment and punishment according to law. *People v. Jerome*, 73 N. Y. S. 306, 36 Misc. Rep. 256.

A city officer is not exempt from criminal punishment for an act, merely because a statute provides for his removal for such act. *State v. Kelly*, 103 Mo. App. 711, 77 S. W. 996.

Indictment proper (by statute). *People v. Wood*, 4 Parker Cr. Rep. (N. Y.) 144; *State v. Hall*, 97 N. C. 474, 1 S. E. 683.

An indictment against an officer of the City of Pueblo for buying warrants of such city, states no offense if it fails to show that the City of Pueblo referred to therein is the City of Pueblo in the County

of Pueblo, Colorado. *Trine v. People* (Colo., 1906), 86 Pac. 100.

18. **Public contracts illegally let.** On an indictment against a city officer for letting a contract to one other than the lowest bidder an objection that the bid accepted, although highest in price, might in fact be the lowest, by reason of the superior quality of the article to be furnished thereunder, will not be considered by the court. *People v. Scannell*, 82 N. Y. S. 362, 40 Misc. Rep. 297, 17 N. Y. Cr. R. 279.

On an indictment against a city officer for letting a city contract to one other than the lowest bidder, it cannot be held that there was no lowest bidder because each of two bidders made the lowest price. *People v. Scannell*, 82 N. Y. S. 362, 40 Misc. Rep. 297, 17 N. Y. Cr. R. 279.

Where a board of public works contracted for work and material without previously advertising for proposals in violation of an express prohibition in the city charter the members thereof may be indicted. *State v. Startup*, 39 N. J. L. 423.

The statutes imposing criminal liability vary as to detail but in essentials they are the same and intended to punish wilful corruption and neglect of duty in public office. By provisions of the statutes of the State of Missouri (which are similar to the laws in other jurisdictions), a criminal liability is imposed on any officer, agent or servant of incorporated cities and towns, or municipal townships:

1. Who shall embezzle or convert to his own use any of the money or funds that may have come to him by virtue of his office, etc.<sup>19</sup>

2. Who shall loan out any money or valuable security received by him, or which may be in his possession or keeping.<sup>20</sup>

3. Who shall make any contract or agreement with any person or body corporate, by which such officer is to derive any benefit or advantage from the deposit with such person of any moneys or valuable securities held by him.<sup>21</sup>

19. R. S. Mo. 1909, § 4556.

It is immaterial on the trial of an indictment of an officer, whether the defendant formed an intent to convert the money to his own use at, or after, the time he collected it. *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *State v. Noland*, 111 Mo. 473, 19 S. W. 715.

The provisions of this section are applicable as well to officials whose offices were created after the section became a law as to those already existing. *State v. Hays*, 78 Mo. 600.

The words in this section, "under color or pretense," of an office cannot be construed to apply to an officer, who, having in fact, no

right to the custody of public money, obtains possession of it by falsely representing that he is entitled to it by virtue of his office. *State v. Bolin*, 110 Mo. 209, 19 S. W. 650.

As to sufficiency of indictment, see *State v. Manley*, 107 Mo. 364, 17 S. W. 810; *State v. Noland*, 111 Mo. 473, 19 S. W. 715; *State v. Hall*, 126 Mo. 585, 29 S. W. 582.

20. R. S. Mo. 1909, § 4557.

The prohibition in this section against public officers "loaning out" the public moneys, does not forbid the depositing of such moneys in bank. *State v. Rubey*, 77 Mo. 610; *State v. Wilson*, 77 Mo. 633.

21. R. S. Mo. 1909, § 4558.



4. Who shall wilfully or corruptly vote for, or certify for allowance any claim or demand against the city or municipal corporation of which he is officer or agent.<sup>22</sup>

5. Who shall vote for the fraudulent disbursement of any money or property belonging to any such city.<sup>23</sup>

6. Who shall fail to account for any and all fees received in his official capacity, or on account of his office.<sup>24</sup>

7. Who shall accept any bribe.<sup>25</sup>

8. Who shall accept any bribe to make appointments to office.<sup>26</sup>

9. Who shall be guilty of wilful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office.<sup>27</sup>

10. Who shall commit any fraud in his official capacity or under color of his office.<sup>28</sup>

22. R. S. Mo. 1909, § 4560.

Auditing false claim. *People v. Gleason*, 75 Hun 572, 27 N. Y. S. 670.

23. R. S. Mo. 1909, § 4561.

The fine imposed under this section by way of punishment is in no sense a substitute for any civil remedy for moneys illegally diverted from their proper channel. *Knox County v. Hunolt*, 110 Mo. 67, 19 S. W. 628.

As to indictment, see *State v. Pinger*, 57 Mo. 243.

24. R. S. Mo. 1909, § 4563.

Failure to account to successor. *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372.

25. R. S. Mo. 1909, § 4396; *State v. Lehman*, 182 Mo. 424; 66 L. R. A. 490, 81 S. W. 1118; *State v. Meysenberg*, 171 Mo. 1; 71 S. W. 229; *State v. Sullivan*, 110 Mo. App. 75, 84 S. W. 105.

26. R. S. Mo. 1909, § 4397; *State v. Graham*, 96 Mo. 120, 8 S. W. 911.

27. R. S. Mo. 1909, § 4411.

An indictment against an officer, under this section of the stat-

ute, should charge that the acts complained of were done not only wilfully, but knowingly and corruptly. *State v. Hein*, 50 Mo. 362.

But the ingredient of corruption does not enter into every act of oppression, misconduct or abuse of authority by an officer in his official capacity and under color of his office. *State v. Ragsdale*, 59 Mo. App. 590; *State v. Latshaw*, 63 Mo. App. 620.

An information for malicious oppression in office need not allege that the acts were done corruptly and from improper motive, and is sufficient if it charges the offense in the language of the statute with proper specification. *State v. Ragsdale*, 59 Mo. App. 590.

A judgment upon conviction under this section against a mayor of a city properly forfeits his office in proceedings analogous to *quo warranto*. *State v. Ragsdale*, 59 Mo. App. 590.

28. R. S. Mo. 1909, § 4412; *State v. O'Gorman*, 68 Mo. 179.

11. Who shall, by color of his office, unlawfully and wilfully exact or demand or receive any fee or reward to execute or do his duty, etc.<sup>29</sup>

12. Who shall be convicted of any wilful misconduct or misdemeanor in office, or neglect to perform any duty enjoined on him by law.<sup>30</sup>

29. R. S. Mo. 1909, § 4414; *State v. Sanders*, 62 Mo. App. 33.

30. R. S. Mo. 1909, § 4416; *State v. Boyd*, 196 Mo. 52, 94 S. W. 536; *State v. Kopper*, 65 Mo. 478; *State v. Abin*, 50 Mo. 419.

**Misdemeanor.** To establish the charge of misdemeanor in office the conduct of the officer must be shown to have been wilful or corrupt; error in judgment merely, or ignorance or mistake of the law, is not enough, unless it be so gross as to show him to be entirely unfit for the office, and to render his tenure of office dangerous to the community. *State ex rel. v. Hixon*, 41 Mo. 210.

The refusal of the clerk of a county court to produce the books and papers in his office before the court for its inspection and action thereon, when thereto required, is a misdemeanor in office. *State ex rel. v. Bowen*, 41 Mo. 217.

**Failure to perform duty.** Under a statute providing that if any city officer shall knowingly or wilfully neglect or refuse to perform any duties required of him by law, or shall violate his duty in any respect, he should, on conviction, be fined or imprisoned, or both, a mayor and aldermen are subject to indictment for failure to give notice as required by statute of an election held to determine whether or not there should

be an increase in taxation. *State v. Glennen*, 93 Miss. 836, 47 So. 550.

An inspector of beef may be indicted for refusing to perform his official duties. *Commonwealth v. Genter*, 17 Serg. & R. (Pa.) 135.

**Police officers.** Criminal responsibility of police officers for wilful neglect of duty. *People v. Glennon*, 79 N. Y. S. 997, 78 App. Div. 271, 67 N. E. 125; *People v. Foody*, 79 N. Y. S. 240, 39 Misc. Rep. 142.

Under statutes providing that a public officer who wilfully neglects to perform any duty enjoined on him by law, shall, where no special provision is made for the punishment of such delinquency, be guilty of a misdemeanor, a police officer who wilfully permits the maintenance of houses of ill fame in his precinct is guilty of such misdemeanor. *People v. Herlihy*, 73 N. Y. S. 236, 66 App. Div. 534, affirmed in 170 N. Y. 584, 63 N. E. 1120; *People v. Diamond*, 76 N. Y. S. 57, 72 App. Div. 281.

Facts constituting wilful neglect of duty of police captain. See *People v. Diamond*, 76 N. Y. S. 57, 72 App. Div. 281.

Under a statute requiring policemen, upon being informed that an offense has been or is being com-

13. Who shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required of him in the discharge of the duties of his office.<sup>31</sup>

14. Charters often provide that any officer who shall commit any fraud on the city shall be guilty of a misdemeanor.<sup>32</sup>

15. Municipal officers are also often made subject to criminal prosecution for violating laws forbidding them

mitted, to proceed to the place where the offender is to be found and arrest the offender the failure to make the arrest is the gist of the offense, and a failure to allege same in an information against a policeman under the statute is fatal. *State v. King*, 28 Mont. 268, 72 Pac. 657.

An indictment against a police officer for a wilful neglect of duty in failing to make an arrest for infractions of the law committed in the presence of such officer, which fails to allege that the officer acted corruptly, is fatally defective. *State v. Flynn*, 119 Mo. App. 712, 94 S. W. 543.

Award of contract without advertising, with evil intent, is criminal. *State v. Kern*, 51 N. J. L. 259, 17 Atl. 114.

Leasing property for longer time than allowed by charter is criminal, when. *People v. Wood*, 4 Parker Cy. Rep. (N. Y.) 144.

Omission to take an official oath to the effect that the officer is not interested pecuniarily in any contract with the city, held not to be punishable as a misde-

meanor, but a wilful omission to perform a public duty by a public officer. *People v. Ryall*, 58 Hun (N. Y.) 235, 11 N. Y. S. 828.

**Failure to keep streets in repair.** Where public officers have power and means to do so, failure to keep them in passable condition, or leaving them dangerous, is indictable under statutes. *Nowlin v. State*, 49 Ala. 41; *McCaIn v. State*, 62 Ala. 138; *Com. v. Hopkinsville*, 7 B. Mon. (46 Ky.) 38; *Hammar v. Covington*, 3 Metc. (60 Ky.) 494; *State v. Fayetteville Comrs.*, 4 N. C. 419, 6 Am. Dec. 567; *State v. Hayward*, 48 N. C. 399; *State v. Fishplate*, 83 N. C. 654; *Com. v. Jones*, 5 Pa. County Ct. Rep. 13; *State v. Barksdale*, 5 Hump. (24 Tenn.) 154; *Hill v. State*, 4 Sneed (36 Tenn.) 443.

31. R. S. Mo. 1909, § 10203; *State v. Taylor*, 93 Mo. App. 327.

32. Greater New York Charter, § 1551.

Sufficiency of indictment under. *People v. Kane*, 61 N. Y. S. 632, affirmed 161 N. Y. 380, 55 N. E. 946.

from being interested either directly or indirectly in contracts of any character with the local corporation.<sup>33</sup>

16. Also, for voting on a question in which the officer is interested either directly or indirectly, there may be a criminal liability.<sup>34</sup>

17. And sometimes liability attaches for permitting a dangerous nuisance to exist.<sup>35</sup>

33. Interested in city contracts. Indictment of officer for being interested in the construction of public work as a joint subcontractor, must show that a contract for the work had been let by the public authorities. *State v. Feagans*, 148 Ind. 621, 48 N. E. 225.

A member of the board of public works is guilty of a crime who becomes directly or indirectly interested in any contract for the purchase of any property or fire insurance for the use of the state, county, township, city, town, or village. *Doll v. State*, 45 Ohio St. 445, 15 N. E. 293.

Under an indictment against an officer for becoming interested in a contract for the purchase of property for the use of a city it cannot be shown as a defense that the proper officer had not certified that the money required for the contract was in the treasury to the credit of the proper fund and specially set aside for that purpose. *Doll v. State*, 45 Ohio St. 445, 15 N. E. 293.

An indictment charging in the language of the statute that defendant, under an assumed name, entered into a contract with the city while he was an officer of such city is sufficient. *State v.*

*Kelly*, 103 Mo. App. 711, 77 S. W. 996.

An information alleging that defendant, while a member of the board of aldermen, executed as president of a corporation in which he was also a stockholder, a lease with the city, through its board of docks, for a city pier for such corporation, is insufficient to charge a crime or misdemeanor under a statute prohibiting a member of the assembly from becoming directly or indirectly interested in a contract with the city. *People v. Mayor*, 84 N. Y. S. 817, 41 Misc. Rep. 368, 17 N. Y. C. R. 479.

34. Voting on question in which officer is interested. Where city aldermen were prohibited from, and subject to indictment for, voting on any question in which they are directly or indirectly interested, those voting to increase their salaries as aldermen were held to be indictable therefor. *State v. Shea*, 106 Ia. 735, 72 N. W. 300.

35. Permitting nuisance. An indictment of municipal officials for permitting a nuisance in the highway is bad if it does not set out that they thereby violated an official duty. *Com. v. Kinnaird*, 18 Ky. L. Rep. 647, 37 S. W. 840.

## 11. REMOVAL AND SUSPENSION OF OFFICERS.

## § 551. Exercise of the power—controlling law.

Removal and suspension of officers is controlled by the particular law applicable and its proper construction. Under some laws the power of removal or suspension can be exercised only for "cause"<sup>36</sup> which means specific and definite charges, justifying action, with legal notice, reasonable opportunity to be heard and a finding or judgment.<sup>37</sup> Sometimes officers may be removed at the pleasure of the officer under whom they work or at the pleasure of the board or department controlling the service in which they are employed.<sup>38</sup>

It is usual to make provision for the removal or suspension of officers, subordinates and employees in the municipal service when found guilty of violation of of-

Not liable for voting for ordinance resulting in nuisance. *Com. v. Kimport*, 12 Pa. County Ct. Rep. 463.

When not liable for suffering nuisance. *State v. Knoxville*, 80 Tenn. 146, 47 Am. Rep. 331.

Permitting dangerous nuisance. *State v. Hall*, 97 N. C. 474, 1 S. E. 683.

36. *Kentucky*. *Todd v. Dunlap*, 99 Ky. 449, 36 S. W. 541.

*Michigan*. *Speed v. Detroit*, 97 Mich. 198, 56 N. W. 570; *Atty. Gen. v. Corliss*, 98 Mich. 372, 57 N. W. 410.

*Missouri*. *State ex rel. v. Walbridge*, 62 Mo. App. 162, 164; *State ex rel. v. Brown*, 57 Mo. App. 199; *State ex rel. v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663, following *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372.

*New Hampshire*. *Hagerty v. Shedd*, 75 N. H. 393, 395, 74 Atl. 1055.

*New Jersey*. *Whitney v. Van Buskirk*, 40 N. J. L. 338, 14 Atl. 578; *McCann v. New Brunswick*, 73 N. J. L. 161, 62 Atl. 191; *Haight v. Love*, 39 N. J. L. 14.

*New York*. *People v. Sturgis*, 80 N. Y. S. 194, 39 Misc. Rep. 448; *People v. Butler*, 108 N. Y. S. 848, 124 App. Div. 148; *People v. Raymond*, 114 N. Y. S. 365, 129 App. Div. 30.

*Utah*. *People v. McAllister*, 10 Utah 357, 37 Pac. 578.

A charter provision forbidding the discharge of a policeman during his term except upon a trial for cause is valid. *Houston v. Mahoney*, 35 Tex. Civ. App. 45, 80 S. W. 1142; *Same v. Floeck* (Tex. Civ. App. 1904), 80 S. W. 1198.

37. §§ 552, 556, 564 *post*.

38. §§ 489, 492 *ante*, § 559 *post*.

ficial duty, or where they are incompetent, faithless, corrupt or inattentive to the public trust with which they are clothed.<sup>39</sup> However, charters and laws may confer

**39. California.** Crossman v. Kenniston, 97 Cal. 379, 32 Pac. 448; Fraser v. Alexander, 75 Cal. 147, 16 Pac. 757.

**Connecticut.** State v. Kennelly, 75 Conn. 704, 55 Atl. 555.

**Georgia.** Gill v. Brunswick, 118 Ga. 85, 44 S. E. 830; Lamb v. Brunswick, 121 Ga. 345, 49 S. E. 275.

**Illinois.** Heaney v. Chicago, 117 Ill. App. 405; People v. Lindblom, 215 Ill. 58, 74 N. E. 73; Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252, reversing Lindblom v. Blake, 124 Ill. App. 282; Kamman v. Chicago, 222 Ill. 63, 78 N. E. 16.

**Indiana.** Roth v. State, 158 Ind. 242, 63 N. E. 460.

**Kentucky.** Thomas v. Thompson, 31 Ky. L. Rep. 524, 102 S. W. 849; Neumeyer v. Krakel, 28 Ky. L. Rep. 190, 62 S. W. 518.

**Louisiana.** De Armas v. Bell, 109 La. 181, 33 So. 188.

**Maryland.** Upshur v. Ward, 94 Md. 778, 51 Atl. 828.

**Massachusetts.** Removal by mayor. Hogan v. Collins, 183 Mass. 43, 66 N. E. 429.

**Missouri.** State ex rel. v. Hanes, 177 Mo. 360, 76 S. W. 653; Blackwell v. Thayer, 101 Mo. App. 661, 74 S. W. 375; State v. Police Commissioners, 80 Mo. App. 206, affirmed in 71 S. W. 215.

**Nebraska.** Moores v. State, 74 N. W. 823, 54 Neb. 486; State v. Moores, 63 Neb. 345, 88 N. W. 490; Moores v. State, 67 Neb. 536, 93 N. W. 986.

**New Hampshire.** Gibbs v. Manchester, 73 N. H. 265, 61 Atl. 128.

**New Jersey.** Marran v. Common Council (N. J. Sup., 1905), 61 Atl. 13; Campbell v. Board of Police Commissioners, 71 N. J. L. 98, 58 Atl. 84.

**New York.** Dalton v. Dalton, 108 N. Y. S. 626, 123 App. Div. 855; People v. Greene, 179 N. Y. 253, 72 N. E. 99, reversing 87 N. Y. S. 1017; People v. McAdoo, 102 N. Y. S. 656, 117 App. Div. 438; People v. Bingham, 102 N. Y. S. 347, 117 App. Div. 192; McAvoy v. Press Pub. Co., 99 N. Y. S. 1041, 114 App. Div. 540; People v. Dept. of Health, etc., 83 N. Y. S. 800, 86 App. Div. 521; People v. Sturgis, 88 N. Y. S. 631, 96 App. Div. 620, affirmed in 183 N. Y. 540, 76 N. E. 1105; People v. Flynn, 111 N. Y. S. 1065, 58 Misc. Rep. 621; In re Elder, 103 N. Y. S. 617, 118 App. Div. 25; In re Fitzgerald, 82 N. Y. S. 811; People v. Wells, 83 N. Y. S. 789, 86 App. Div. 270, reversed 68 N. E. Rep. 883; People v. Department of Health of City of New York, 83 N. Y. S. 800, 86 App. Div. 521; People v. Partridge, 83 N. Y. S. 705, 86 App. Div. 310; In re Lazenby, 78 N. Y. S. 302, 76 App. Div. 171.

**Vermont.** Brownell v. Russell, 76 Vt. 326, 57 Atl. 103.

**Washington.** Ryan v. Handley, 43 Wash. 232, 86 Pac. 398.

A charter provision authorizing the mayor to remove officers is

power to remove and suspend officers and those in public positions without cause, or charges and trial, but such power must be expressly conferred.<sup>40</sup>

In the absence of legislation on the subject of removal and grounds therefor, it is usually held that the power to remove is incident to the power to appoint, and the authority to appoint an officer carries with it the resultant power to remove him,<sup>41</sup> where the tenure of office is not otherwise defined, restrained or limited;<sup>42</sup> but the power to remove is not incidental to the power to appoint where the term of such officer is for a definite period prescribed by law.<sup>43</sup>

not repealed by implication unless the new legislation is inconsistent therewith. *Johnson v. Shea*, 198 Mass. 411, 84 N. E. 600; *State ex rel. v. Heimberger*, 210 Mo. 601, 109 S. W. 758.

Statutes providing for the removal of police officers of San Francisco are superseded by the charter of San Francisco, providing for the removal of such officers by police commissioners. *Dinan v. Superior Court*, etc. (Cal. 1907), 91 Pac. 806.

40. *Hallgren v. Campbell*, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408, 21 Am. St. Rep. 557, and note; *Stadler v. Detroit*, 13 Mich. 346.

41. *Coffey v. Superior Court*, etc., 147 Cal. 525, 82 Pac. 75; *Parish v. St. Paul*, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. Rep. 374; *Conwell v. Cul de Sac*, 13 Idaho 575, 92 Pac. 535.

**Summary removal.** The legislature of Oklahoma has the power to authorize the mayor and city council of cities of the first class to remove summarily any elective or appointive officer of

such cities, without notice or hearing. *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135.

42. *Venable v. Board of Police Commissioners*, 40 Ore. 458, 67 Pac. 202.

43. *People v. Healy*, 231 Ill. 629, 83 N. E. 453.

**Discretionary power to remove.** *State ex rel. v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *Indianapolis v. Geisel*, 19 Ind. 344.

**Inherent.** Held, that there is no inherent power in the governing body of a municipal corporation to remove for cause an officer. *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555, 22 L. R. A. 842, 57 N. W. 446.

Particular charter provisions held not to impliedly authorize removal. *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555, 22 L. R. A. 842, 57 N. W. 446.

**Construction of power of removal in particular cases.** *Palmer v. Foley*, 44 How. Pr. (N. Y.) 308, 45 How. Pr. (N. Y.) 110; *People v. New York*, 16 Hun (N. Y.) 309.

Offices and places in the public service may be abolished legally, as pointed out elsewhere,<sup>44</sup> and when this occurs, of course, the incumbent stands, or may be, removed.<sup>45</sup>

As mentioned in another place in this work,<sup>46</sup> officers and persons in public positions, may be advanced or reduced in grade and salary or transferred to another

44. § 494 *ante*.

45. **Abolition of office.** Limitations upon the power of the board of public safety to make changes in the personnel of the police force do not restrict the legislative power of the council in abolishing the offices of captains and removing the incumbents before the expiration of their terms. *Neumeyer v. Krakel*, 23 Ky. L. Rep. 190, 62 S. W. 518.

**Civil service restrictions.** Upon the abolition in good faith of an office filled by a civil service employee, he may be discharged without a hearing and the duties of such office may be transferred to another person in the classified service. *Chicago v. People*, 114 Ill. App. 145.

Under laws providing that on the abolition of certain positions or offices, the holders thereof shall be deemed suspended, an employee so suspended is not entitled to notice and an opportunity to explain, as granted by charter in cases of removal from the civil service. *People v. Wells*, 79 N. Y. S. 728, 78 App. Div. 373.

Under a law which provides that no removal from a civil service office shall be affected or influenced by political or religious opinions or affiliations, it was held

unlawful to abolish such an office and discharge the officer for political affiliation. *People v. Hertle*, 60 N. Y. S. 23, order modified, 61 N. Y. S. 965.

**Veteran.** "The law is well settled that an honorably discharged veteran of the Union army may be removed for the reason that the position which he occupies is abolished on economical grounds, and that its duties may be attached to an existing office which is not held by a veteran." *People v. Feitner*, 69 N. Y. S. 141, 58 App. Div. 594.

**Abolition of place.** Upon the abolition of the position of messenger in the department of parks on economical grounds, the messenger may be summarily removed. *In re Seide*, 78 N. Y. S. 253, 38 Misc. Rep. 663.

**Change of law.** A statute which simply changes the name of an office and transfers the duties thereof to a person other than the incumbent, and does not in fact abolish the office, cannot have the effect of removing the incumbent. *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798; *State ex rel. v. Hamby*, 114 Tenn. 361, 84 S. W. 622.

46. §§ 507 to 509 *ante*.



office or department, but such change will not constitute removal from office or public place.<sup>47</sup> So failure to re-appoint an officer upon the expiration of a definite term, and the selection of another to fill the office is not a removal from office.<sup>48</sup>

## § 552. Removal of officers for cause.

The power to remove a corporate officer from his office for reasonable and just cause, is one of the common law incidents of all corporations. This doctrine has been settled ever since Lord Mansfield's judgment in *Rex v. Richardson*.<sup>49</sup> In that case it was expressly held, that the power existed although it had not been given by charter, nor was it claimed by prescription, in this language: "We think that from the reason of the thing, from the nature of the corporation, and for the sake of order and government, this power is incident as much as the power of making by-laws."<sup>50</sup>

In the absence of either express grant or of express or implied limitation of authority, a municipal corporation, as ordinarily constituted, possesses the incidental power, to remove corporate officers for cause, whether elected by it or by the people.<sup>51</sup> The general rule is that before an officer can be ousted by other than the appointing power he is entitled to a hearing.<sup>52</sup>

47. Change from detective to patrolman, not removal. *Stainsky v. Newark*, 49 N. J. L. 175, 6 Atl. 882.

Reduction in grade and salary is not removal. *Walters v. New York*, 190 N. Y. 375, 83 N. E. 48.

48. Veteran. Rule applied to a veteran, under civil service rules. *People v. Dobbs Ferry*, 71 N. Y. S. 578, 63 App. Div. 276.

49. 1 Burr, 517, 539.

50. *Savannah v. Grayon*, 104 Ga. 105, 30 S. E. 693.

51. *State ex rel. v. New Orleans*, 107 La. 632, 32 So. 22.

A statute prohibiting the removal of a patrolman occupying the position of detective sergeant except for dereliction of duty upon charges and a trial, amounts to the creation of an office and a permanent tenure, and is therefore unconstitutional. *People v. Partidge*, 79 N. Y. S. 724, 78 App. 199.

52. *Board of Commissioners v. Johnson*, 124 Ind. 145, 19 Am. St. Rep. 88, and note.

It seems hardly necessary to state that the power in the matter of removal conferred by the charter or legislative act applicable can neither be extended nor restricted by ordinance,<sup>53</sup> or contract.<sup>54</sup>

Where the power of removal is conferred, and the procedure therefor is not specified, there exists an implied requirement of proper notice to the officer of charges preferred,<sup>55</sup> and a full opportunity for him to be heard, and the designated agency is clothed with the necessary power to carry out his authority.<sup>56</sup> But if the officer is appointed during pleasure, or if the power of removal is discretionary, as explained elsewhere, the power to remove may be exercised without notice or hearing. However, where the appointment is during good behavior, or where the removal must be for cause, the power of removal can only be exercised when charges are made against the accused, and after notice with a reasonable opportunity to be heard before the officer or body having the power to remove.<sup>57</sup>

53. *Carter v. Durango*, 16 Colo. 534, 27 P. 1057, 25 Am. St. Rep. 294; *Proctor v. Blackburn*, 28 Tex. Civ. App. 351, 65 S. W. 548.

See ch. 15 *post*.

**Ordinance can not change.** Where, under the charter the council alone has power to appoint and remove subordinate officers, an ordinance cannot confer such power on the mayor and council. *Volk v. Newark*, 47 N. J. L. 117.

And this doctrine will apply to all authority conferred upon any body, department, board or officer of the city.

54. **Contract.** Where the constitution limits the terms of officers not otherwise provided for, to two years, subject to removal for cause, a contract of the city with a policeman, authorizing the

city to discharge him at any time without notice or cause is void as against public policy. *Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925.

55. *Laughlin v. Fairbanks*, 3 Mo. 367; *Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152; *State ex rel. v. St. Louis*, 90 Mo. 19, 1 S. W. 757.

56. *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663.

57. *Colorado*. *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784.

*Connecticut*. *Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907.

*Florida*. *Etzler v. Brown* (Fla. 1909), 50 So. 416.

*Kentucky*. *Todd v. Dunlap*, 99 Ky. 449, 36 S. W. 541; *Combs v.*

### § 553. Removal of elective officers—nature of power.

The rule usually applied is that, unless the law provides to the contrary, an officer elected by popular vote for a definite period can be removed from office only by impeachment, or by judgment of forfeiture of a competent judicial tribunal.<sup>58</sup> Some courts also take the position that where power of removal of such officer is conferred in express terms upon an officer or tribunal other than judicial (which has been sustained),<sup>59</sup> its ex-

Bonnell, 33 Ky. L. Rep. 219, 109 S. W. 898.

*Massachusetts.* Lattime v. Hunt, 196 Mass. 261, 81 N. E. 1001.

*Maryland.* Board of Street Commissioners v. Williams, 96 Md. 232, 53 Atl. 923.

*Michigan.* Bolger v. Common Council, 153 Mich. 540, 117 N. W. 171, 15 Det. Leg. N. 516.

*Missouri.* State ex rel. v. St. Louis, 90 Mo. 169, 1 S. W. 757.

*New Jersey.* Markley v. Cape May Point, 55 N. J. L. 104, 25 Atl. 259; Corwin v. Markley, 55 N. J. L. 107, 25 Atl. 260; Bakely v. Nowrey, 68 N. J. L. 95, 732, 52 Atl. 289.

*New York.* People v. Ahearn, 117 N. Y. S. 810, 133 App. Div. 52; People v. Brady, 70 N. Y. S. 823, 62 App. Div. 609; People v. De Forest, 82 N. Y. S. 59, 83 App. Div. 410; People v. Flood, 71 N. Y. S. 1067, 64 App. Div. 209; People v. Sturgis, 84 N. Y. S. 403, 87 App. Div. 413; People v. Hoffman, 90 N. Y. S. 184, 98 App. Div. 4; People v. Folke, 85 N. Y. S. 1100, 89 App. Div. 171; People v. President of Borough of Queens, 105 N. Y. S. 637, 121 App. Div. 229; People v. Brookfield, 6 App. Div. 445, 39 N. Y.

S. 677; People v. Waring, 40 N. Y. S. 275, 7 App. Div. 204.

*Utah.* People v. McAllister, 10 Utah 357, 37 Pac. 578.

*Rhode Island.* Maroney v. Pawtucket, 19 R. I. 3, 31 Atl. 265.

Under a charter forbidding removal of those who had served in the voluntary fire department except for cause, a mere showing that the one charged had served in such department and was disabled is insufficient. People v. Porter, 90 Hun (N. Y.) 401, 35 N. Y. S. 811.

**Town office.** A chief of police of a town, appointed under an ordinance providing that such chief shall be the head of the police department and devote his entire time to the affairs of the town, is a town officer and not a mere constable and cannot be removed except for cause, upon charges and a trial. Norton v. Adams, 24 R. I. 97, 52 Atl. 688.

58. Attorney-General v. Stratton, 194 Mass. 51, 79 N. E. 1073.

59. The legislature has power under the Constitution of Pennsylvania to remove, or to authorize directly or indirectly the removal of an elected municipal officer. Neuls v. Scranton, 211 Pa.

ercise must be viewed as *quasi-judicial*, and hence, a valid judgment of removal must be based on sufficient grounds and the officer must be given an opportunity to be heard.<sup>60</sup>

Adhering to the strict rule of the English common law which regards an office as a hereditament, and proceeding upon the ground that the incumbent has a property in the office of which he cannot be deprived without the judgment of a court after due notice and a hearing, authority conferred upon an executive agency is declared to be strictly a judicial power.<sup>61</sup>

As mentioned elsewhere in this work, offices in this country are not held by grant or contract, nor have the

581, 61 Atl. 77; *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351.

The phrase "any officer," in a city charter authorizing the council to remove any officer after notice and a hearing, refers to all officers whether elected by the people or by the council. *Riggins v. Richards*, 97 Tex. 229, 77 S. W. 946.

60. *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112.

61. *Indiana*. Board, etc. v. Johnson, 124 Ind. 145, 19 Am. St. Rep. 83, 24 N. E. 148.

*Kentucky*. *Tompert v. Lithgow*, 1 Bush. (64 Ky.) 176.

*Michigan*. *Doran v. De Long*, 48 Mich. 552, 12 N. W. 848; *Dulan v. Willson*, 53 Mich. 392, 19 N. W. 112; *Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606.

*Minnesota*. *State v. Peterson*, 50 Minn. 239, 243, 52 N. W. 655; *State v. Duluth*, 53 Minn. 288, 55 N. W. 118, 39 Am. St. Rep. 595.

*New Jersey*. *Bowlby v. Dover*,

68 N. J. L. 97, 52 Atl. 289; *State v. Prichard*, 36 N. J. L. 101.

*New York*. *People v. Purroy*, 56 Hun (N. Y.) 650, 10 N. Y. S. 181.

*Ohio*. *State v. Sullivan*, 58 Ohio St. 505, 65 Am. St. Rep. 781, 51 N. E. 48.

*Oklahoma*. *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135.

*South Dakota*. *State ex rel. v. Hewitt*, 3 S. D. 187, 52 N. W. 875, 44 Am. St. Rep. 788.

*Virginia*. *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652, 4 Va. Sup. Ct. Rep. 121.

Trial by mayor and council denied. Where the legislature attempts to authorize the mayor and council to remove an officer for specified cause upon hearing and evidence while that part which authorizes the removal for the causes named will be upheld, the right of the mayor and council to try him will be denied, because the procedure calls for judicial action and not the exercise of political power. *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135.

officers a private property or vested right or interest in them. A public office is a public trust to be exercised for the benefit of the public.<sup>62</sup> From this conception the rule is deduced that the exercise of the power of removal from office is administrative, as distinguished from judicial.<sup>63</sup> This is the prevailing judicial view relating to the exercise of the removal of appointive officers.<sup>64</sup>

### § 554. Officer appointed for a definite term.

Removal of officers appointed for fixed terms can be exercised legally only by virtue of express power, if by an administrative officer or tribunal, or a judicial court of competent jurisdiction.<sup>65</sup>

The rule applied to the officers of the Federal government is different. In the absence of law controlling the power of removal it may be exercised by the appointing authority notwithstanding the term of the officer is expressly specified by law, in like manner as in the case of an officer appointed for an indefinite term or one holding at the pleasure of his superior. The theory is that the power of removal is incident to, or inherent in, the appointing authority, and hence it exists by implication.<sup>66</sup> However, as mentioned, in the state and municipal service, the prevailing judicial opinion is that an officer elected or appointed for a definite term can only be re-

62. § 494 *ante*.

63. *State ex rel. v. Superior*, 90 Wis. 612, 64 N. W. 304.

64. *Fuller v. Attorney-General*, 98 Mich. 96, 57 N. W. 33; *State ex rel. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *Donahue v. Wills County*, 100 Ill. 94; *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

"Removal of officers." 25 Am. Law Rev., pp. 206, 207; *Throop, Pub. Off.*, § 345, 346.

The removal, by the board of trustees of a village, of a police

officer appointed by them under a statute is not the usurpation of a judicial power of the state as prohibited by the constitution. *Conwell v. Cul de Sac*, 13 Idaho 575, 92 Pac. 535.

65. *People v. Healy*, 231 Ill. 629, 83 N. E. 453; *State v. Chatburn*, 63 Iowa 659; *State ex rel. v. Wilson*, 151 Mo. App. 719, 723, 132 S. W. 625.

66. *Parsons v. United States*, 167 U. S. 324, 17 Sup. Ct. 880.

moved for cause; power to remove at pleasure will not be implied. It only exists when expressly given.<sup>67</sup>

### § 555. Removal from office to be by agency authorized.

It seems to be the established rule everywhere that the power to remove "for cause" only is regarded as a special authority and must in every instance, be strictly pursued<sup>68</sup> by the agency specified, or, authorized to act under a proper construction of the law applicable, whether it be the governor of the state, the mayor or other chief officer, or a board or the governing legislative body, or by an executive officer and another body, as the mayor and council.<sup>69</sup>

67. § 553, ante.

Rule applied to the superintendent of a poor-house. *State ex rel. v. Brown*, 57 Mo. App. 199.

Also, the chief of police. *State ex rel. v. Police Commissioners*, 14 Mo. App. 297, 88 Mo. 144.

Also, to police justice, *State ex rel. v. St. Louis*, 90 Mo. 19, 1 S. W. 757.

Also, health commissioner. *State ex rel. v. Walbridge*, 62 Mo. App. 162.

Also, police officers. *State ex rel. v. Walbridge*, 153 Mo. 194, 54 S. W. 447.

Also, city treasurer. *State ex rel. v. Wilson*, 151 Mo. App. 719, 723, 132 S. W. 625.

68. *State v. Sullivan*, 58 Ohio St. 50, 5 Am. St. Rep. 781; *Commonwealth v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680; *State ex rel. v. Walbridge*, 69 Mo. App. 657.

What officers? City Engineer may be. *Mobile v. Squire*, 49 Ala. 339.

Denied. *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206.

When charter provisions as to removal prevail over general statutes see, *State ex rel. v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457.

69. Who may remove. A statute providing that officers and boards of a city may remove their subordinates for cause does not prevent the removal of a janitor of a police station by the police commissioners who were appointed by and responsible to the governor. *Sims v. O'Meara*, 193 Mass. 547, 79 N. E. 824.

Where the city charter authorizes the removal of policemen only by the board of police and fire commissioners after due investigation and trial, the superior court is not authorized to remove such official, under the provisions of a penal code charging him with misdemeanor in office. *Craig v. Superior Court*, 157 Cal. 481, 108 Pac. 310.

Under charter providing that any employee may be removed only by the appointing power on filing a statement of the reasons

A chief officer as the mayor or a board or department, especially the council, may be clothed with *quasi*-judicial power to remove municipal officers.<sup>70</sup> Under some laws the governor of the state may remove certain officers, e. g., police commissioners,<sup>71</sup> but other laws deny this power.<sup>72</sup>

therefor with the civil service commission, a clerk in the police department, appointed by the chief, can be removed only by the chief and not by the civil service commission. *Easson v. Seattle*, 32 Wash. 405, 73 Pac. 496.

Where the power to hire or discharge employees of a municipal lighting plant is in the manager, the mayor cannot re-employ an engineer discharged by the manager. *Capron v. Taunton*, 196 Mass. 41, 81 N. E. 873.

Under the charter of New Haven the director of public works, having power to appoint and employ his clerical assistants, could discharge such employee for cause duly shown which was not political. *Neal v. New Haven*, 83 Conn. 151, 154, 76 Atl. 543.

70. *Carter v. Durango*, 16 Col. 534, 27 Pac. 1057, 25 Am. St. Rep. 294; *Stadler v. Detroit*, 13 Mich. 346, 348; *People ex rel. v. O'Brien*, 122 N. Y. S. 25, 137 App. Div. 311; *State ex rel. v. Wilson*, 151 Mo. App. 719, 132 S. W. 625.

A general law providing for the removal of city officers by the mayor and council for cause does not apply to a city marshal where

another section of the law provides that the marshal may be removed by the mayor and council for certain causes (naming them). *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135.

71. *Attorney-General v. Detroit*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450.

Police commissioners appointed by governor, removable by governor only. *State v. Shearman*, 51 Kan. 686, 35 Pac. 455; *Hogan v. Carhery*, 6 Ohio Dec. 729, 4 Wkly. Law Bul. 113.

Under the Constitution of Pennsylvania the governor alone may remove at pleasure recorders of cities of the first class. *Lane v. Commonwealth*, 103 Pa. St. 481.

72. Cannot remove fire and police commissioners, when. *State v. Smith*, 35 Neb. 13, 16 L. R. A. 791, 52 N. W. 700.

Under the Constitution of Colorado the governor has no power to remove from office the members of the fire and police board of the City and County of Denver. *People ex rel. v. Adams*, 31 Colo. 476, 73 Pac. 866; *People ex rel. v. Burpreese*, 31 Colo. 476, 73 Pac. 866; *People ex rel. v. Wilson*, 31 Colo. 476, 73 Pac. 866.

Often the power of removal of municipal officers is conferred upon the mayor alone.<sup>73</sup> Where power is conferred upon the mayor to remove, and, in his absence by virtue of the charter the president of the board of aldermen becomes acting mayor, the latter may without consent of the aldermen remove an officer from office.<sup>74</sup> Under the general power to remove, unless restrained by law the mayor may remove officers appointed by his predecessor.<sup>75</sup>

73. *Connecticut*. State v. Kennelly, 75 Conn. 704, 55 Atl. 555; Sullivan v. Martin, 81 Conn. 585, 71 Atl. 783.

*Louisiana*. State ex rel. v. Mayor, 43 La. Ann. 92, 8 So. 893.

*New York*. People v. Cooper, 57 How. Pr. (N. Y.) 395, 6 Abb. N. C. 474.

*Rhode Island*. Keenan v. Goodwin, 17 R. I. 648, 24 Atl. 148.

*Massachusetts*. Hogan v. Collins, 183 Mass. 43, 66 N. E. 429; Williams v. Gloucester, 148 Mass. 256, 19 N. E. 248.

*South Dakota*. State v. Williams, 6 S. D. 119, 60 N. W. 410.

Mayor has not power to remove police officer (State officers). State v. Hudson, 44 Ohio St. 137, 5 N. E. 225; Graudstoff v. Ridgely, 36 Gratt. (Va.) 1.

A statute authorizing the mayor to remove at pleasure an officer appointed by him, repeals a provision of the city charter giving the power of removal of such officer to the council. People v. Boland, 71 N. Y. S. 233, 35 Misc. Rep. 117.

Under a charter providing that "the mayor shall have power to remove any officer appointed by him whenever he shall be of the opinion that the interests of the

city demand such removal," the power of removal for cause is absolute, notwithstanding charter requires the mayor to report "the reasons for such removal to the council at its next regular session." State v. Williams, 6 S. D. 119, 60 N. W. 410.

74. Devlin v. Platt, 20 How. Pr. (N. Y.) 167.

75. Officer appointed by his predecessor. A charter authorizing the mayor to remove "any officer appointed by him," does not refer to an individual appointment, but to those officers who are appointed by the mayor. O'Neil v. Mansfield, 95 N. Y. S. 1009, 47 Misc. Rep. 516; Carroll v. Mansfield, 95 N. Y. S. 1009, 47 Misc. Rep. 516; Brannagan v. Mansfield, 95 N. Y. S. 1009, 47 Misc. Rep. 516; Hart v. Mansfield, 95 N. Y. S. 1009, 47 Misc. Rep. 516.

Under a charter conferring upon the mayor power to remove at pleasure during the first six months of their terms all officers appointed by him the mayor has authority to remove officers appointed by his predecessor. McLellan v. Marine, 98 Md. 53, 56 Atl. 359.

And such provision applies also to an officer who has been re-ap-



Frequently the power of removal or suspension of municipal officers is given to the council or governing legislative body,<sup>76</sup> and in the absence of law vesting such power elsewhere, it rests with this agency.<sup>77</sup> Under a charter providing that "all the corporate powers of the corporation shall be exercised by the council," the power of removal of officers for misconduct which under the common law is vested in the corporation at large is by such provision conferred upon the council.<sup>78</sup>

If the law require the action of two or more agencies, as an executive officer and a board,<sup>79</sup> or the mayor and

pointed to a second term. *McLellan v. Marine*, 98 Md. 53, 56 Atl. 359.

Under a charter authorizing the mayor to remove any person appointed by him or his predecessors whenever he may believe him incompetent or unfaithful or that the requirements of the public service demand it, the mayor may remove a police commissioner for acts done during the term of the mayor's predecessor and in the exercise of discretion conferred upon such commissioner by law. *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

76. *Indiana*. *Goodwin v. State*, 142 Ind. 117, 41 N. E. 359.

*Kentucky*. *Gibbs v. Louisville*, 99 Ky. 490, 18 Ky. Law Rep. 341, 36 S. W. 524; *Com. v. Willis*, 19 Ky. Law Rep. 962, 42 S. W. 1118.

*Louisiana*. *State ex rel. v. Adams*, 46 La. Ann. 830, 15 So. 490.

*Michigan*. *Grant v. Alpena*, 107 Mich. 335, 65 N. W. 230.

*Missouri*. *State v. Walker*, 63 Mo. App. 110.

Power conferred upon the council to remove by a vote of three-fourths any elected or appointed officer includes power to remove the mayor. *State v. Superior*, 90 Wis. 612, 64 N. W. 304.

77. *Removal in council*. Power to remove or suspend municipal officer rests with governing body and city, and cannot be exercised by an individual or inferior board unless specifically granted. Hence, where law provides that police officers may be removed by the board of police in certain cases such board has no power to suspend. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

78. *Richards v. Clarksburg*, 30 W. Va. 31, 4 S. E. 774.

79. *Policemen to be suspended by chief, with approval of board, suspension by board without approval of chief, void*. *Binggold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

council,<sup>80</sup> to compass legally a removal or suspension, definite action on the part of both is essential.

Power to remove may be, and sometimes is, conferred upon two or more authorities, in which case the jurisdiction of each is consistent and concurrent.<sup>81</sup>

80. *Illinois*. *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 353, 43 N. E. 709, 56 Ill. App. 581.

*Maine*. *Andrews v. King*, 77 Me. 224.

*Missouri*. *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372.

*Pennsylvania*. *Com. v. Black*, 201 Pa. St. 433, 50 Atl. 1008.

*Texas*. *San Antonio v. Serna*, 45 Tex. Civ. App. 341, 99 S. W. 875.

**Mayor and council.** A statute authorizing the mayor to dismiss policemen with the consent of the council is not in violation of the constitution providing that officers may be removed at the pleasure of the power by which they were appointed, as policemen are ministerial agents and not within the constitutional provision. *Commonwealth v. Black*, 201 Pa. 433, 50 Atl. 1008.

Under charter providing for the appointment of officers by the mayor with the consent of the council, the appointment of a city clerk by the mayor and council cannot be recalled or annulled by the council. *In re Fitzgerald*, 82 N. Y. S. 811, 88 App. Div.

81. **Concurrent jurisdiction.** A provision of a freeholder's charter authorizing the mayor to institute administrative proceedings before the municipal board, for

the removal of officers, does not supersede a statute providing for the initiation of proceeding for the removal of such officers by the grand jury nor supplant the concurrent jurisdiction of the superior court to try the charges. *Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75.

A general law which confers jurisdiction on the superior court to entertain proceedings for the removal of municipal officers, does not thereby render invalid a charter provision conferring similar jurisdiction on the board of trustees, "subject to and controlled by" the general law; but the jurisdiction of both is consistent and concurrent. *Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75.

A statute authorizing the council to remove city officers for any offense against the character or duty of his office is not repealed by implication by a statute providing that such officers may be removed by the circuit court for intoxication, upon the complaint of any citizen, or by a statute providing that an accusation in writing may be presented by the grand jury against such officers for misconduct in office. *State v. Noblesville*, 157 Md. 31, 60 N. E. 704.

## § 556. Sufficiency of cause for removal.

If the charter or law applicable specifies grounds for which the power of removal may be exercised no other ground or grounds may be invoked.<sup>82</sup> So, if the law merely provides for removal, but does not enumerate causes therefor, the grounds are limited to those specified in the state constitution.<sup>83</sup> Sometimes general power only to remove for cause is conferred. In one case an ordinance providing for removal for misconduct in office was held to be within the general welfare clause.<sup>84</sup>

"Sufficient cause," or "due cause," means legal cause as distinguished from discretion, and is a cause which specifically relates to and affects the proper administration of the office involved.<sup>85</sup> Hence, it is obvious that mere political bias or personal dislike of the officer having the power of removal is not a cause.<sup>86</sup> So mere error of judgment will not suffice.<sup>87</sup> So, ordinarily, particular acts of usurpation of power, on the part of the mayor, having no legal effect on the affairs of the city, are not sufficient grounds for removal.<sup>88</sup>

Usually want of capacity or incompetency is good ground for removal.<sup>89</sup> Thus a mayor who claims that obedience to a city ordinance lies within his discretion,

82. *Shaw v. Macon*, 19 Ga. 468.

83. *Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72.

84. *State ex rel. v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457.

85. *Michigan. Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555, 22 L. R. A. 842, 57 N. W. 406.

*Minnesota. State v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118.

*Maine. Andrews v. King*, 77 Me. 224.

*New Hampshire. Hagerty v. Shedd*, 75 N. H. 393, 74 Atl. 1055.

*New Jersey. Haight v. Love*, 39 N. J. L. 14.

*Texas. Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629.

*New York. People v. Thompson*, 94 N. Y. 451.

*Wisconsin. State v. Watertown*, 9 Wis. 254.

86. *People v. New York*, 19 Hun (N. Y.) 441.

87. *People v. Board of Fire Commissioners*, 6 N. Y. St. 658.

88. *Gillett v. People*, 8 Colo. App. 553, 59 Pac. 72.

89. *People v. Campbell*, 82 N. Y. 247.

or that the dictates of his conscience will not admit of its observance, is incompetent under a charter authorizing his removal by the council for incompetency.<sup>90</sup> Sometimes carelessness and inattention to official duties will justify removal.<sup>91</sup>

Cause that would justify removal of an officer of one kind or of one public institution might not be sufficient to justify the removal of an officer of another kind or of an officer of another institution.<sup>92</sup>

It is sometimes held that default or neglect of duty in another office does not justify removal of an officer from his present office;<sup>93</sup> that cause which would render one ineligible as a member of the board of aldermen existing at the time of his election will not justify his removal thereafter;<sup>94</sup> that where a member of a council is removed for a specific cause and is then re-elected to the body he cannot be removed the second time for the same cause.<sup>95</sup>

The doctrine of condonation of past offenses is often judicially applied to elective officers, and hence it is some-

90. *Riggins v. Waco*, 100 Tex. 32, 90 S. W. 657, 93 S. W. 426.

Actions and damages for illegal removals. *Bravin v. Tombstone*, 3 Ariz. 83, 33 Pac. 589; *Shaw v. Macon*, 19 Ga. 468; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372.

91. *People v. Grant*, 12 Daly (N. Y.) 294.

Charges of carelessness and insubordination as established not sufficient to warrant removal of patrolman. *People ex rel. v. Baker*, 123 N. Y. S. 493, 139 App. Div. 148.

"Neglect of duty" is sufficient for removal of a municipal employee. *McCarthy v. Emerson*, 202 Mass. 352, 88 N. E. 668.

What constitutes want of attention to the duties of his office

by a member of a board of public works. *State v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495.

92. *State ex rel. v. Walbridge*, 69 Mo. App. 657, 669.

93. *People v. Weygant*, 14 Hun (N. Y.) 546.

See *State v. Patton*, 131 Mo. App. 628, 110 S. W. 636.

94. *Ellison v. Raleigh*, 89 N. C. 125.

95. *State v. Jersey City*, 25 N. J. L. 536.

Under a statute providing that no officer or employee in the police department shall be removed except for just cause a police officer cannot be removed because of ineligibility existing at the time of his appointment. *Magner v. Yore*, 75 N. J. L. 198, 66 Atl. 948.

times said that an officer cannot be removed for an offense committed during a former term in another office for which he has not been convicted.<sup>96</sup> However, it has been ruled that a policeman may be removed for acts committed prior to the beginning of his term of service, if it appears that it would be disastrous to the discipline or efficiency of the force to retain him.<sup>97</sup>

Under a charter conferring upon the council power to remove for "disorderly behavior or malconduct in office," the mayor cannot be removed for appointing to the police force one against whom a prosecution is pending for resisting an officer.<sup>98</sup>

Soliciting funds for campaign expenses which were collected and used for this purpose justify removal of the mayor, if found guilty, where such mayor was the head of the departments and whose subordinates contributed to such funds.<sup>99</sup> Under the New York charter providing that no fireman shall contribute to any political fund or belong to any association intended to affect legislation, it has been held that a fireman cannot justify a violation thereof by the assumption that he was acting not as a member of the fire department but as an American citizen.<sup>1</sup>

Under a charter authorizing the city council to remove officers for misconduct in office the council may remove a mayor who wilfully and persistently refuses to sign orders for the pay of city officers for services which could not be paid for in any other way.<sup>2</sup>

A law rendering it unlawful for any candidate to provide or agree to provide, money to be used by another in making any bet on any event arising out of an election,

96. *State v. Patton*, 131 Mo. App. 628 *et seq.*, 110 S. W. 636.

97. *Tibbs v. Atlanta*, 125 Ga. 18, 53 S. E. 811; *State v. Whitaker*, 116 La. 947, 41 So. 218.

98. *State v. Treasdale*, 21 Fla. 652.

99. *State v. Superior*, 90 Wis. 612, 60 N. W. 304.

1. *People v. Scannell*, 77 N. Y. S. 704, 74 App. Div. 406.

2. *Riggins v. Waco*, 100 Tex. 32, 90 S. W. 657, 93 S. W. 426; *Riggins v. Richards*, 97 Tex. 526, 79 S. W. 84.

and declaring that a violation thereof shall be a misdemeanor, does not authorize the removal of a mayor who has violated it, in the absence of a prosecution and conviction of such offense in a court of competent jurisdiction.<sup>3</sup>

Obviously, the solicitation and acceptance of a bribe by a police officer to influence his conduct relative to the prosecution of one charged with crime is sufficient ground for the removal of such officer.<sup>4</sup> So soliciting bribes by a member of a committee of a council is sufficient cause for removal.<sup>5</sup> And receiving bribes for official influence and votes constitute disorderly conduct.<sup>6</sup>

Many other grounds appear in the cases in the note.

3. *Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72.

Gambling by city marshal is not neglect of duty nor malpractice in office. *Macon v. Shaw*, 16 Ga. 172.

4. *People v. Powell*, 127 Ill. App. 614.

Soliciting or receiving bribes. *Com. v. Sanderson*, 11 Pa. Co. Ct. 593; *In re Jenkintown*, 16 Montg. County Rep. (Pa.) 73.

5. *Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. W. 150.

6. *Tyrrell v. Jersey City*, 25 N. J. L. 536.

7. **Misconduct.** If a public officer whose duty it is to prosecute the keeper and inmates of a house of ill fame resorts to the same for immoral purposes, he is guilty of gross immorality and thereby forfeits his office, under the Constitution, art. IV, § 6, which provides that "all officers elected or appointed under the Constitution may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty or

gross immorality in such manner as may be prescribed by general laws." *Moore v. Strickling*, 46 W. Va. 515, 50 L. R. A. 279, 33 S. E. 274.

**Malfeasance and misfeasance** in office occurs when a city attorney stipulates with one who has brought action against the city not to appeal from the decision of the trial court and afterwards reports to the council that he has done nothing to prevent an appeal. *People v. Auburn*, 85 Hun (N. Y.) 601, 33 N. Y. S. 165.

**Miscellaneous causes.** Councilmen becoming sureties of treasurer, ground of forfeiture. Held, if they did, court had jurisdiction to inquire. *Com. v. Allen*, 70 Pa. St. 465.

Violation of a charter provision that no head of a department shall become interested directly or indirectly in the purchase of real estate by the city is sufficient cause for removal. *People v. New York*, 52 Hun (N. Y.) 483, 5 N. Y. S. 538; *People v. Rochester*, 126 N. Y. 621, 27 N. E. 409.

### § 557. Restrictions as to removal — civil service — veterans.

Under some laws the power of removal is restricted by civil service laws and regulations, and veterans' acts, and when such provisions exist, in exercising the power of removal they must, in substance, be observed. Civil

Under law allowing removal "for the good of the service" under probation, intoxication is good ground. *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429.

Unprovoked assault by a police sergeant upon a fellow sergeant is conduct unbecoming an officer and, hence, is a ground for removal. *People v. McClave*, 123 N. Y. 512, 25 N. E. 1047. See, also, *People ex rel. v. Baker*, 124 N. Y. S. 1056, 140 App. Div. 137.

The failure of members of the board of water commissioners to comply with "an act regulating the receipt and disbursement and the passage of ordinances pertaining thereto in any city in the state," is sufficient to authorize their removal by the council under a statute authorizing their removal for cause. *Cohn v. New Brunswick*, 73 N. J. L. 128, 62 Atl. 285.

Under a charter requiring a board of examiners to investigate charges of dereliction of duty, etc., against police officers "and report the facts found by them" to the mayor, and authorizing the mayor to remove or suspend such officer "where found guilty or when recommended for dismissal by said board," the mayor may remove such an officer where the board's

findings of fact showed a dereliction of duty, though the report found him not guilty. *Brownell v. Russell*, 76 Vt. 326, 57 Atl. 103.

Charges and proof of "intoxication" as "official misconduct" sufficient to warrant removal of a mayor from office. *State ex rel. v. Henderson*, 145 Iowa 657, 124 N. W. 767.

Under New York charter absence without leave of any member of the uniformed force of the street department is deemed to be a resignation and the member so absent may be dismissed therefrom by the commissioner without notice. *People v. Woodbury*, 78 N. Y. S. 362, 75 App. Div. 503.

Absence without leave, because of sickness of fireman, not cause. *People v. Wurster*, 91 Hun (N. Y.) 233, 36 N. Y. S. 160.

A fire commissioner authorized by statute to remove officers and employees on charges has no power to remove or suspend a chief of the fire department because he refused to prolong a vacation granted to him at his own request. *In re Croker*, 175 N. Y. 153, 67 N. E. 307, dismissing Appeal of *People v. Sturgis*, 79 N. Y. S. 640.

In one case the charter conferred power upon the council to

service laws regulating the appointment, tenure, and removal of public officers and employees have generally been held constitutional. The prevailing rule is that, where the power of appointment is conferred in general terms, and without restriction, the power of removal, in the discretion and at the will of the appointing power, is implied, and always exists," unless restricted and limited by some provision of law,<sup>8</sup> and civil service laws

remove any person appointed by it for cause. Here it was held that a removal for cause which seemed sufficient to the council was valid. *Hoboken v. Gear*, 27 N. J. L. 265.

A police commissioner who is *ex officio* trustee of the police pension fund is not guilty of neglect of duty or of misconduct or *malfeasance* in office for relying on the reports of expert examiners of the police fund made to the city council from time to time, instead of making a personal examination of the records and accounts, where he is not shown to be guilty of any neglect of general duties or wrong doing. In *re Adam*, 99 N. Y. S. 273, 113 App. Div. 534.

**Slander of other officers.** The courts are disinclined to hold the speaking of slanderous words a ground for amotion from public office. *State ex rel. v. New Orleans*, 107 La. 632, 32 So. 22.

"A statement made in confidence by a member of the New Orleans city council to the mayor,

that he heard rumors reflecting on the official integrity of the other members of the council, is a privileged communication, and furnishes no ground for the expulsion of the member making it, even though the informant upon whom he relies fails to substantiate it." *State ex rel. v. New Orleans*, 107 La. 632, 32 So. 22.

**Officers interested in city contracts.** Under a statute forbidding members, officers and agents of a municipal corporation from being interested in any contract for furnishing supplies to such corporation, a councilman who is a co-owner with his brother of a stone quarry may be removed from office for assisting in ratifying a contract with his brother to supply the municipality with stone. *Commonwealth v. Witman*, 217 Pa. 411, 66 Atl. 986.

8. *People v. Barker*, 39 N. Y. S. 140, 5 App. Div. 227, affirmed in 150 N. Y. 570, 44 N. E. 1127; *People v. Robb*, 126 N. Y. 180, 27 N. E. 267.

See § 558 *post*.



do not operate as a restriction upon the power of removal unless so provided.<sup>9</sup>

9. *People v. Dalton*, 50 N. Y. S. 1028, 23 Misc. Rep. 294, affirmed in 54 N. Y. S. 1112.

**Civil service laws are valid.** *Illinois*. *People v. Kipley*, 171 Ill. 44, 49 N. E. 229; *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *Kipley v. Luthardt*, 178 Ill. 525, 53 N. E. 74; *Morrison v. People*, 196 Ill. 454, 63 N. E. 989.

*Massachusetts*. Opinion of Justices, 138 Mass. 601.

*New York*. *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274.

*New Jersey*. *New Brunswick v. Fitzgerald*, 48 N. J. L. 457, 8 Atl. 729.

*Texas*. *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328; *Callaghan v. Irvin*, 40 Tex. Civ. App. 453, 90 S. W. 335.

*United States*. See *United States v. Newton*, 20 D. C. Rep. 226; *Ex parte Curtis*, 106 U. S. 371, 3 Sup. Ct. Rep. 381.

**Civil service restriction must be observed.** *Illinois*. *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184, affirming 120 Ill. App. 398; *O'Neill v. Fitzsimmons*, 114 Ill. App. 168, affirmed in *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797, affirming 114 Ill. App. 168; *Lindblom v. Doherty*, 102 Ill. App. 14; *Fish v. McGann*, 205 Ill. 179, 68 N. E. 761.

*Massachusetts*. *Garvey v. Lowell*, 199 Mass. 47, 85 N. E. 182.

*New York*. *People v. Lindenthal*, 173 N. Y. 524, 66 N. E. 407; *People v. Coler*, 79 N. Y. S. 1085, 78 App. Div. 248; *People v. Dept.*

*of Health*, 83 N. Y. S. 800, 86 App. Div. 521, affirmed in 176 N. Y. 602, 68 N. E. 1123.

**Removals under civil service regulations.** Who is person holding "a strictly confidential position." *People v. Dalton*, 160 N. Y. 686, 55 N. E. 1099.

**Civil service rules relating to removals, requisites.** *People v. Coler*, 159 N. Y. 569, 54 N. E. 1094; *People v. Cram*, 61 N. Y. S. 858, affirmed 64 N. Y. S. 158; *People v. Dalton*, 60 N. Y. S. 909; *People v. Feitner*, 62 N. Y. S. 969.

**Opportunity to explain.** *People v. Thompson*, 26 Hun (N. Y.) 28.

**In explaining, clerk may have counsel.** *In re Emmet*, 65 How. Pr. (N. Y.) 266.

**Explaining charge.** *People v. MacLean*, 58 Hun (N. Y.) 152, 11 N. Y. S. 559; *People v. N. Y. Fire Comrs.*, 12 Hun (N. Y.) 500.

**A department head who is, in general terms and without restriction, empowered by charter to appoint and employ his clerical force, has the right to discharge them, subject to the restrictions imposed by statutory or civil service laws.** *Neal v. New Haven*, 83 Conn. 151, 76 Atl. 543.

**The civil service act of Pennsylvania relating to cities of the first class is intended to make full provision for the appointment and removal of officers and employees in the civil service of such cities, and no officer, clerk, employee, or laborer in the civil service of such cities can be appointed, transferred, reinstated or removed in**

Civil service rules and veterans' acts which attempt to restrict the power of a head of department, granted by charter to remove employees, are invalid.<sup>10</sup>

Such laws usually provide that employees under the civil service can be removed only for some dereliction, or neglect or incapacity to perform some duty, or some general delinquency affecting their general character and fitness for office, and upon written charges, a hearing and evidence;<sup>11</sup> and forbid appointments and removals

any manner or by any means other than those provided in the act. *Truitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

10. *Murphy v. Keller*, 70 N. Y. S. 405, 61 App. Div. 145.

Restricting power by civil service rules. A civil service rule declaring that no person shall be removed unless he has had an opportunity to present an explanation, and requiring a statement of the cause of removal to be served on the employee, is a substantial limitation upon the power of removal and, therefore, void. *People v. Scannell*, 70 N. Y. S. 983, 62 App. Div. 249.

Void restriction as to removal of veteran. A statute prohibiting the removal of veterans "except for incompetency or misconduct after a hearing" will not prevent the removal of a veteran without such cause by an officer having constitutional power to remove subordinates without charges. See *ley v. Franchot*, 102 N. Y. S. 221, 52 Misc. Rep. 302.

An act prohibiting the removal or discharge of veteran officials or employees, without reasonable

and just cause, is violative of an article of the Constitution declaring that "appointed officers \* \* \* may be removed at the pleasure of the power by which they shall have been appointed." *Commonwealth ex rel. v. Rutherford*, 8 Pa. Dist. Rep. 349.

11. *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797, affirming 114 Ill. App. 168; *Rockford v. Comp-ton*, 115 Ill. App. 406; *People v. New York*, 83 N. Y. S. 800, 86 App. Div. 521; *Kenney v. Kane*, 59 N. Y. S. 555, 27 Misc. Rep. 680; *Fruitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

Acts constituting grounds for removal. *Brinck v. N. Y.*, 16 Hun (N. Y.) 340; *People v. Meyers*, 57 Hun (N. Y.) 587, 10 N. Y. S. 815; *Connor v. New York*, 64 Hun (N. Y.) 635, 137 N. Y. 545, 33 N. E. 336.

Discharge is completed by notice. *Jackson v. New York*, 87 Hun (N. Y.) 296, 34 N. Y. S. 346.

Board's approval of discharge made by its superintendent, is a discharge by board. *O'Dowd v. Boston*, 149 Mass. 443, 21 N. E. 949.

to be influenced by political or religious opinions or affiliations.<sup>12</sup>

Ordinarily such laws and regulations do not apply to mere temporary employees,<sup>13</sup> or to probationary service;<sup>14</sup> nor do they apply where the removal is made in good faith for reasons of economy;<sup>15</sup> nor where an office or place is abolished in good faith.<sup>16</sup>

12. **Political reasons.** Where charter provided that no removal from a civil service office shall be affected or influenced by political or religious opinions or affiliations, held unlawful to abolish such an office and discharge the officer for political affiliation. *People v. Hertle*, 60 N. Y. S. 23, order modified, 61 N. Y. S. 965.

13. Where a person has passed the civil service examination for ordinary clerk and afterwards accepts employment in various city offices as extra clerk, such employment is temporary, and the termination thereof without a hearing is not a discharge in violation of a charter regulating the removal of civil service employees. *Rodrigue v. Rogers*, 4 Cal. App. 257, 87 Pac. 563.

14. **Probationary service.** Under a statute providing for a six months' period of probation for civil service employees before the position is made permanent such employee can be removed during such period only on the day of the expiration of such period. *People v. Kearney*, 74 N. Y. S. 391, 36 Misc. Rep. 717.

After the expiration of the probation period of a civil service employee, the position becomes permanent, and such employee can be removed only after a hearing and an opportunity to make an

explanation. *People v. Kearney*, 74 N. Y. S. 391, 36 Misc. Rep. 717.

The probation term provided by statute for civil service employees commences on the day the employee begins work. *People v. Low*, 77 N. Y. S. 661, 74 App. Div. 246.

15. *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797; *Caulfield v. Jersey City*, 63 N. J. L. 148, 43 Atl. 433; *Kenney v. Kane*, 59 N. Y. S. 555, 27 Misc. Rep. 680.

**Economy and good faith.** The removal of a veteran without notice and a hearing, when done for reasons of economy and in good faith, is not a violation of the statutes relating to veterans. *People ex rel. v. Scannell*, 62 N. Y. S. 930, 48 N. Y. App. Div. 445; *People v. Waring*, 40 N. Y. S. 275, 7 N. Y. App. 204; *People ex rel. v. Simis*, 45 N. Y. S. 940, 18 App. Div. 199; *People ex rel. v. Squire*, 42 N. Y. S. 1, 10 N. Y. App. Div. 415; *People v. Adams*, 51 Hun (N. Y.) 583; *Sutherland v. Jersey City*, 61 N. J. L. 436, 39 Atl. 710; *Boylan v. Police Commr's*, 58 N. J. L. 133, 32 Atl. 78.

16. **Abolition of office in good faith.** An act prohibiting the abolition of any office or position held by any honorably discharged Union soldier, sailor or marine for the purpose of terminating the service of such employee, does

Where the laws authorizing the removal of civil service employees by the civil service commission for cause are silent as to what constitutes "cause," the prevailing judicial view is that the commission has the right to determine such question.<sup>17</sup>

As mentioned, laws limiting the power of removal of officers who are honorably discharged soldiers, sailors, and marines, often apply to the fire and police departments, and are usually sustained. The judicial view on various phases of laws of this character appears from the cases in the note.<sup>18</sup>

not prevent the abolition of such position if the same is done in good faith and for the public interest. *Stivers v. Jersey City*, 70 N. J. L. 606, 57 Atl. 143, State ex rel. v. Board, etc. of Jersey City, 63 N. J. L. 542, 43 Atl. 445; State ex rel. v. Jersey City, 63 N. J. L. 148.

"The law is well settled that an honorably discharged veteran of the Union Army may be removed for the reason that the position which he occupies is abolished on economical grounds, and that its duties may be attached to an existing office which is not held by a veteran." *People v. Feitner*, 69 N. Y. S. 141, 58 App. Div. 594.

See § 572 *post*.

17. *Kammann v. Chicago*, 222 Ill. 63, 78 N. E. 16.

18. Removals of preferred persons as soldiers, sailors and marines under particular provision. *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612; *People v. Scannell*, 160 N. Y. 103, 54 N. E. 670; *People v. Drake*, 60 N. Y. S. 309, 43 App. Div. 325; *People v. Coler*, 79 N. Y. S. 1085, 78 App. Div. 248; *Jones v. Wilcox*, 80 N. Y. S. 420, 80 App. Div. 167.

Special cases, under particular provisions. *Lewis v. Board of Public Works*, 51 N. J. L. 240, 17 Atl. 112; *MacDonald v. Newark*, 55 N. J. L. 267, 26 Atl. 82; *Horan v. Board of Education*, 58 N. J. L. 533, 33 Atl. 944; *People v. Gilroy*, 60 Hun (N. Y.) 507, 15 N. Y. S. 242; *People v. Adams*, 133 N. Y. 203, 30 N. E. 851, reversing 53 Hun (N. Y.) 141, 6 N. Y. S. 123; *Meyers v. New York*, 69 Hun (N. Y.) 291, 23 N. Y. S. 484; *People v. Board of Education*, 84 Hun (N. Y.) 417, 32 N. Y. S. 377; *People v. Starks*, 33 Hun (N. Y.) 384.

Laws constitutional. Such laws are not unconstitutional though they extend the preference of veterans beyond that accorded them by the Constitution. *Stutzbach v. Coler*, 168 N. Y. 416, 61 N. E. 697, affirming 70 N. Y. S. 901.

Persons protected. Under civil service laws prohibiting the removal, except for incompetency or misconduct, of a clerk who is a veteran fireman, such a clerk, appointed by the coroner under a charter which does not prescribe the tenure, cannot be removed by the coroner, at pleasure. *People*

### § 558. Removal of appointive officers without term.

Unless the law otherwise provides, if the officer is appointed, or elected as by a council or board, and no definite term is prescribed, he holds at the will or pleasure of his superior or the appointing or electing authority,

*v. Cahill*, 188 N. Y. 489, 81 N. E. 453, 1172.

An employee who is an honorably discharged soldier but did not serve in the Civil or Spanish war is not within the protection of the New York laws requiring a hearing upon charges and due notice in order to accomplish his removal. *People v. Hynes*, 91 N. Y. S. 1032, 101 App. Div. 453.

A deserter is not an honorably discharged soldier under a charter forbidding removal except for good cause shown. *Francis v. Newark*, 58 N. J. L. 522, 33 Atl. 853.

**Notice of status.** The filing of a certificate in the office of a department that an employee thereof is an exempt volunteer fireman is sufficient notice of the status of such employee so as to prevent his discharge without the hearing on notice and charges required by civil service laws. *People v. President of Borough, etc.*, 105 N. Y. S. 637, 190 N. Y. 497, 83 N. E. 597.

**Notice and hearing.** Notice of the charge and an opportunity to explain. *People v. Woodbury*, 99 N. Y. S. 573, 114 App. Div. 188.

Under laws requiring heads of departments before removing clerks to allow them an opportunity to make an explanation, a notice to a typewriting copyist, that charges of incompetency and

neglect of duty had been preferred against her and that she would be allowed an opportunity of making an explanation forty-eight hours from the time of service of such notice, is sufficient. *People v. Butler*, 103 N. Y. S. 583, 54 Misc. Rep. 18.

The giving of written notice to an employee before he can be removed, as prescribed by the civil service laws, is jurisdictional. *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575.

Under civil service laws providing that no veteran shall be removed except for misconduct, after a hearing on due notice, the comptroller of the City of New York has no power to remove a veteran employed in a department in which there were other employees not veterans in order to reduce the force, without charges, a hearing and notice. *Stutzbach v. Coler*, 168 N. Y. 416, 61 N. E. 697, affirming 70 N. Y. S. 901.

A regular clerk in the fire department, who is a veteran, cannot be discharged without a hearing while other employees in the department, not entitled to preference, are retained to perform the same or similar work. *People v. Sturgis*, 77 N. Y. S. 1008, 38 Misc. Rep. 433.

**Application for hearing.** Under laws providing that no veteran shall be removed from employ-

hence, the power of removal may be exercised at any time by such agency. In such case the power of removal is regarded as incident to the power of appointment or election.<sup>19</sup>

ment except after a full hearing on notice, a veteran is not required to apply for a hearing, in order to entitle him thereto. *Ransom v. Boston*, 196 Mass. 248, 81 N. E. 998.

**Explanation.** Where the employee satisfactorily answered the reasons assigned for his removal, he cannot be lawfully removed. *Fruitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

**Proof of charges.** Charges preferred against an employee must be proved by a fair preponderance of the evidence, to warrant his removal thereon. *People v. Blake*, 123 N. Y. S. 493, 139 App. Div. 148.

**Damages for removal.** The city is liable in damages to a veteran who is wrongfully discharged from municipal employment. *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481, 193 Mass. 537, 79 N. E. 823.

A veteran who is wrongfully removed from public office has an action for damages against those removing him. *Bean v. Clausen*, 99 N. Y. S. 44, 113 N. Y. App. Div. 129; *Fallon v. Wright*, 81 N. Y. S. 758, 82 N. Y. App. Div. 193. See *Hilton v. Cram*, 97 N. Y. S. 1123, 112 App. Div. 35.

19. *Arkansas. Patton v. Vaughan*, 39 Ark. 211.

*California. Smith v. Brown*, 59 Cal. 672; *Sponogle v. Curnow*, 136 Cal. 580, 69 Pac. 255.

*Colorado. Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057.

*Illinois. People v. Higgins*, 15 Ill. 110.

*Indiana. Carr v. State*, 111 Ind. 101.

*Minnesota. Parish v. St. Paul*, 84 Minn. 426, 87 N. W. 1124.

*Mississippi. Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *Beverly v. Hattiesburg*, 83 Miss. 342, 35 So. 876.

*New Hampshire. Attorney General v. Remick*, 71 N. H. 480, 53 Atl. 308.

*New York. People v. Canton*, 80 N. Y. S. 173, 39 Misc. Rep. 454; *People v. Wells*, 83 N. Y. S. 376, 85 App. Div. 378; *People v. Scannell*, 70 N. Y. S. 983, 62 App. Div. 249; *People v. Robb*, 126 N. Y. 180, 27 N. E. 267; *People v. New York*, 82 N. Y. 491; *People v. New York*, 16 Hun (N. Y.) 309.

*Ohio. Jameson v. Cincinnati*, 28 Ohio Cir. Ct. Rep. 41.

*Oregon. Venable v. Board of Pol. Commissioners of Portland*, 40 Ore. 458, 67 Pac. 203.

*Pennsylvania. Houseman v. Com.*, 100 Pa. St. 222.

*Rhode Island. Willard's Appeal*, 4 R. I. 595.

*Virginia. Davis v. Filler*, 47 W. Va. 413, 35 S. E. 6.

*Wisconsin. State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87, and note.

*United States. In re Hennen*, 13 Pet. (U. S.) 230, 10 L. Ed. 138.

Delegation of power to appoint a subordinate officer for an indefinite term confers upon the ap-

A few state constitutions so declare.<sup>20</sup>

The fact that appointments of persons to office require the approval or confirmation of another officer or tribunal, does not mean that the latter must concur when the power of removal is exercised by the appointing authority.<sup>21</sup>

The presiding officer of a legislative body, not chosen for a term fixed by law may be removed at the pleasure of the body.<sup>22</sup>

20. *State v. Mitchell*, 50 Kan. 289, 33 Pac. 104; *Wilcox v. People*, 90 Ill. 186; *Bergen v. Powell*, 94 N. Y. 591.

21. *Parsons v. United States*, 167 U. S. 324, 17 Sup. Ct. 880; *In re Hennen*, 13 Pet. (U. S.) 230,

10 L. Ed. 138; *Newsom v. Cocks*, 44 Miss. 352, 7 Am. Rep. 686.

22. *State v. Klichli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; *State v. Alt*, 26 Mo. App. 673; *Armitage v. Fisher*, 74 Hun (N. Y.) 167.

pointing power authority to determine its duration. *Robertson v. Coughlin*, 196 Mass. 539, 82 N. E. 678; *Freeman v. Boume*, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510.

**Removal at pleasure—illustrative cases.** The power of appointment of an officer conferred upon the council does not carry with it the power of removal or the power to abridge the term of office. This is controlled by the particular law. *Caulfield v. State*, 1 S. C. 461.

Mere power to appoint does not necessarily confer the power of removal. The proper construction of the law applicable will govern. *People v. McAllister*, 10 Utah 357, 37 Pac. 578.

Power to remove an attorney at law is impliedly reposed in the court which has power to admit him to practice. *Sanborn v. Kimball*, 64 Me. 140.

Under a law conferring power upon the council to remove for

cause and giving that body power to appoint officers to hold during the pleasure of the council, an officer appointed by the council may be removed without notice. *State v. McQuade*, 12 Wash. 554, 41 Pac. 897.

Under a statute providing that certain city officers shall hold their office for a term of two years, but may be removed by the council at its pleasure, the power of the council to remove such officers is not limited to removals for cause, and such officers may be removed by the council without cause and before the expiration of their terms. And such statute is not in violation of the Constitution requiring the general assembly to prescribe the qualifications of all city and town officers, and "the manner in and causes for which they may be removed," etc. *London v. Franklin*, 25 Ky. L. Rep. 2306, 80 S. W. 514.

If the charter confers in express terms, power upon the council to remove an officer at pleasure, an ordinance cannot deprive or restrict the exercise of such power, as by fixing a definite term.<sup>23</sup>

A few exceptional cases limit this power, and hold that, notwithstanding the term may be indefinite, implied power to remove does not exist, and, hence, specific charges must be presented and the officer given an opportunity for hearing. The rule has been applied to the power of a court to remove an attorney at law;<sup>24</sup> however, it can have no application to the office of a municipal corporation, as ordinarily constituted.

### § 559. Removal of subordinates and employees.

The removal of subordinates, assistants, clerks and employees is usually at the pleasure of the officer or department or board with which they are connected, unless the law restricts such power, or removal results in the viola-

Under a statute providing that all officers and employees appointed or employed by the council may be removed by the council at pleasure, an assessor elected by the council may be removed at the pleasure of the council, though another section provides that, except as otherwise provided, any officer of the city, whether elected or appointed, may be impeached and removed by the council for incompetency, inefficiency, neglect or misconduct in office. *Rogers v. Congleton*, 27 Ky. L. Rep. 109, 84 S. W. 521.

Under a charter providing that policemen shall hold their positions during good behavior or until removed by the mayor, or by

the council, the mayor, or the council, in case of his failure to act on request, have the absolute power of removal, and are not limited to removals for cause. *Smith v. Bryan*, 100 Va. 199, 4 Va. Sup. Ct. Rep. 121, 40 S. E. 652.

A board of health authorized by statute to remove a health officer at its pleasure may indicate its pleasure that it no longer desires the services of such officer by appointing a new health officer. *State v. Craig*, 69 Ohio St. 236, 69 N. E. 228.

23. *Mathis v. Rose*, 64 N. J. L. 45, 49 Atl. 1135, 44 Atl. 875.

24. *Strout v. Proctor*, 71 Me. 288; *Sanborn v. Kimball*, 64 Me. 140.



tion of a valid contract.<sup>25</sup> Thus under a charter providing that "the assistants of any officer shall hold their positions during good behavior, unless otherwise provided by ordinance, but may be removed for cause by the mayor or by the officer under whom they work, at his pleasure," an officer, as the building commissioner, has authority to remove an assistant without assigning any cause and without consulting any other officer.<sup>26</sup>

25. *State ex rel. v. New Orleans*, 107 La. 632, 32 So. 22; *People v. New York*, 73 N. Y. 437; *Meyers v. New York*, 69 Hun (N. Y.) 291, 23 N. Y. S. 484; *Jackson v. New York*, 87 Hun (N. Y.) 296, 34 N. Y. S. 346.

**Removal of subordinates and employees.** Law providing that no person employed on the police force can be dismissed without being found guilty of misconduct or incompetency by public trial does not include mere employees in the police department. *People v. York*, 60 N. Y. S. 208, 43 App. Div. 444.

A veteran volunteer fireman appointed inspector of masonry in the department of parks of New York is not the holder of an office to which a salary is attached as an incident but is an employee, who can be dismissed whenever, for lack of work his services become unnecessary. *Dunne v. New York*, 101 N. Y. S. 678, 116 App. Div. 331; *Ernnut v. New York*, 128 N. Y. 117, 28 N. E. 19; *Lethbridge v. New York*, 133 N. Y. 232, 30 N. E. 975.

**Hearing not required.** *O'Dowd v. Boston*, 149 Mass. 443, 21 N. E. 949; *People v. Public Park Commissioners*, 60 How. Pr. (N. Y.) 130; *Phillips v. New York*, 10 *Daly*

(N. Y.) 278, 88 N. Y. 245; *Langdon v. New York*, 92 N. Y. 427.

**Review by courts of discharge generally denied.** *People v. Thompson*, 26 Hun (N. Y.) 28; *People v. Fire Commissioners*, 100 N. Y. 82, 2 N. E. 613; *People v. Koch*, 2 N. Y. St. 110.

**Hearing required.** *People v. New York Fire Commissioners*, 73 N. Y. 437; *People v. Hayden*, 133 N. Y. 198, 30 N. E. 970, reversing 57 Hun (N. Y.) 590, 10 N. Y. S. 794.

**Wrongful, city liable for.** *Purcell v. Long Island City*, 91 Hun (N. Y.) 271, 36 N. Y. S. 290.

26. *Magner v. St. Louis*, 179 Mo. 495, 78 S. W. 782.

**Removal of assistant.** A building inspector is an assistant to the building commissioner in St. Louis, and subject to removal by him at pleasure under the charter. *State ex rel. v. Longfellow*, 95 Mo. App. 668, 69 S. W. 596.

A building inspector is not *ejusdem generis* with janitors, and hence does not come within the purview of an ordinance referring to the removal of "janitors, engineers and other persons." *State ex rel. v. Longfellow*, 67 Mo. App. 665, 67 S. W. 665.

One not the head of a department, but of a bureau only of such department, has no authority to remove subordinates under a law conferring such power upon the head or a law allowing removal of assistants.<sup>27</sup>

Employees may be removed or discharged: where unfit for office,<sup>28</sup> for failure to perform duty,<sup>29</sup> for disobeying instructions,<sup>30</sup> where the appropriation to pay for their service has been exhausted,<sup>31</sup> or where their services are no longer needed.<sup>32</sup>

### § 560. Removal by the recall.

Removal by the recall is provided by some laws, in which case, on a petition signed by a designated number of electors, the question is submitted to the voters, and if the requisite number of votes favor the recall of the officer, he stands removed.<sup>33</sup>

27. *Morgan v. Denver*, 14 Colo. App. 157, 59 Pac. 619.

28. *People v. Fire Commissioners*, 72 N. Y. 445.

29. *People v. White*, 80 Hun (N. Y.) 603, 30 N. Y. S. 163.

30. *People v. N. Y. Fire Commissioners*, 17 Jones and S. (49 N. Y. Super. Ct.) 369.

31. *Lethbridge v. New York*, 133 N. Y. 232, 30 N. E. 975, reversing 27 Jones and S. (59 N. Y. Super. Ct.) 486, 15 N. Y. S. 562.

32. *Langdon v. N. Y.*, 64 How. Pr. 134, 24 Hun (N. Y.) 288.

33. **Removal by the recall.** Where a charter provides that a certain percentage of the electors of a city may petition the council to call an election to determine whether an officer shall be removed, the filing of such a petition bearing the proper number of names as shown by the certifi-

cate of the city clerk, makes it the duty of the council to call such election. *Good v. Common Council*, 5 Cal. App. 265, 90 Pac. 44.

*Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, wherein it was held that the provisions in the charter of the City of Everett, Washington, providing for a recall of city officers upon filing of petition and the holding of an election thereon and the provision therein for suspension by the mayor and removal by the council were not in conflict and concerning which the court observed: "Both the Constitution and the general law recognize that large growing cities should be empowered to determine for themselves and in their own way the many important and complex questions of local policy which arise, and it is only when some act in the

### § 561. Suspension of officers.

Charters usually provide for the suspension of municipal officers either elected or appointed.<sup>34</sup> In the absence of law to the contrary, the power of removal or suspension of municipal officers exists with the governing body of the municipality, but neither power can be exercised by an individual or inferior body unless it is expressly conferred.<sup>35</sup> Where power to expel is given to the corporation the power to suspend is likewise reposed in the corporation and cannot be legally delegated to its officers.<sup>36</sup> But if the charter powers are sufficient, power may be conferred by ordinance upon the mayor to suspend a city officer elected by the people.<sup>37</sup>

Under a law authorizing the board of aldermen to remove city officers, and to regulate the manner of such removals, the city has power to provide by ordinance that an officer shall be suspended pending the investigation of charges against him.<sup>38</sup> Where the rule of a police board authorized the chief of police to suspend police officers with the approval of the board, a suspension by the board without the consent of the chief is invalid.<sup>39</sup>

Suspension is a qualified expulsion and whether termed suspension or expulsion it constitutes either temporary or permanent disfranchisement.<sup>40</sup>

execution of that policy conflicts with the general law or contravenes the Constitution that the act can be questioned. We do not think that the official act sought to be restrained exceeds the power conferred upon the city by the general law or conflicts with it."

34. *State v. Ramos*, 10 La. Ann. 420.

35. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

36. *State ex rel. v. Chamber of Commerce*, 20 Wis. 63.

37. *State ex rel. v. Lingo*, 26 Mo. 496;

See *Westberg v. Kansas City*, 64 Mo. 493.

38. *Blackwell v. Thayer*, 101 Mo. App. 661, 74 S. W. 375.

39. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

A board of police commissioners may provide by rule for the suspension of a patrolman pending a hearing of charges. *State v. Board of Metropolitan Police Commissioners*, 170 Ind. 133, 83 N. E. 83.

40. *State ex rel. v. Chamber of Commerce*, 20 Wis. 63.

Under a charter providing that the mayor may suspend officers for cause and temporarily name another to fill the vacancy with the advice and consent of the council, the council may accept or reject and the council's rejection *ipso facto* terminates the right of the temporary officer to exercise the duties of the office.<sup>41</sup>

Under some charters no officer, as member of the police force, can be suspended without pay unless written charges have been preferred against him.<sup>42</sup> A charter provision giving the police commissioner power to punish police officers by suspension without pay, limiting the time thereof to thirty days for any offense, does not affect the power of the commissioner, granted by another provision, to suspend without pay pending the trial of charges.<sup>43</sup>

## § 562. Does power to remove include power to suspend?

Some cases answer this question in the affirmative.<sup>44</sup> As suggested by Peckham, J., there may be some distinc-

41. *State v. Heinmiller*, 38 Ohio St. 101.

42. *People v. Bingham*, 109 N. Y. S. 1111, 57 Misc. Rep. 677.

43. *Halpin v. New York*, 105 N. Y. S. 520, 54 Misc. Rep. 128.

A police officer sentenced to pay a fine of thirty days' pay is not entitled to pay during suspension. *Halpin v. New York*, 105 N. Y. S. 520, 54 Misc. Rep. 128.

Where a policeman, holding over, was suspended after the expiration of his term, it is immaterial whether such suspension was in accordance with the provisions of the charter. *Houston v. Albers*, 32 Tex. Civ. App. 70, 73 S. W. 1084.

44. Power to remove includes power to suspend. It does not require any argument to show that

the power to remove must include the power to suspend. *Shannon v. Portsmouth*, 54 N. H. 183.

"The power to remove necessarily includes the minor power to suspend." *State ex rel. v. Lingo*, 26 Mo. 496, 499.

It is said *obiter dicta* that where power to expel is given to the corporation the power to suspend is likewise reposed in the corporation. *State ex rel. v. Chamber of Commerce*, 20 Wis. 63.

Suspension is within the power of the corporation because it only accomplishes a temporary deprivation where the corporation has the power to make such deprivation permanent by expulsion. *State ex rel. v. Chamber of Commerce*, 20 Wis. 63.

tion between the power to expel, or, in the technical language of the book, to disfranchise a member of a corporation, and the power to remove an employee of a city board, and it might be argued that in the former case, a suspension is a temporary disfranchisement and an act of the same nature as an expulsion and that the power to expel in such a case will include a temporary exercise thereof by a suspension.<sup>45</sup>

In a New Jersey case it is held that there is nothing in the nature of the power to remove or expel which includes necessarily in all cases the power to suspend. In that case the council had power to expel for cause. It had once expelled a member for bribery and he had been re-elected by the people and the council by resolution virtually suspended him. It was held that the council had no power to again even expel the member for the offense for which he had been once expelled and subsequently to which he had been re-elected; and, as to suspension, the court said the charter vested no such power in the council, and that it would have been extraordinary if it did; that the power was to expel, not to suspend, because expulsion left the office vacant so that it could be supplied by a new election, while suspension from duties created no vacancy and left the constituency of the member unrepresented.<sup>46</sup>

Peckham, J., in approving this case adds that the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. "The rights of a constituency might be affected most deeply by the exercise of the power to suspend, and yet would be in truth untouched by the expulsion of an unworthy representative. Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension

45. Gregory v. New York, 113 N. Y. 416, 11 N. Y. St. 306, 3 L. R. A. 854, 21 N. E. 119.

46. State ex rel. v. Jersey City, 25 N. J. L. 536.

in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence should be indulged in, based upon the grant of the specific power to remove.

“We think it is apparent that the two powers cannot always be properly respectively described as the greater and the less; and consequently, it cannot always be determined, simply upon that ground, that the suspension is valid because there was a power to remove. The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once; and if the duties are such as to demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion for the exercise of the power to fill one. The result is that there may be an office, an officer and no vacancy, and yet none to discharge the duties of the office. By suspension the officer is prevented from discharging any duties and yet there is no power to appoint any one else to the office because there is no vacancy.

“If it be claimed that the power to suspend also includes the power to fill the place of the officer suspended during such suspension, then there is a second presumed power which flows from the simple power to remove. There is the power to suspend and there is the further power to be implied from it, viz., the power to fill the office with another during such suspension, although there is no vacancy in the office.

“We do not think either of these last named powers should be implied in the mere grant of the power to remove. We are not inclined to go so far with the doctrine of implied grants of power, because we think the implication is not one which naturally or necessarily arises out of the nature of the main power granted, and its denial in such cases as this can, as we think, work no possible mischief.

"We do not go to the extent of saying that in no conceivable case can the power to suspend be inferred from a grant of the power to remove. There may be cases where such an inference, arising from the general scope and nature of the act granting the power would be so strong as to compel recognition. We think there is no such inference to be drawn in the case before us."<sup>47</sup>

This case holds that under the power to remove an inspector the board of excise of New York cannot suspend indefinitely without pay.<sup>48</sup>

Under a charter authorizing a police board to remove police officers such board has no power to suspend.<sup>49</sup>

### § 563. Proceedings for removal of officers—in general.

Where power to remove is conferred and the procedure thereof is not specified the law will imply authority to do whatever is proper to execute the power, consistent with the right of the accused to a fair and impartial hearing,<sup>50</sup> which action must provide for notice, charges and opportunity to be heard.<sup>51</sup> In such case the

47. *Gregory v. New York*, 113 N. Y. 416, 11 N. Y. St. 306, 3 L. R. A. 854, 21 N. E. 119.

48. See, also, *State v. Peterson*, 50 Minn. 239, 52 N. W. 655; *State v. Police Comrs.*, 16 Mo. App. 48.

49. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

50. *Riggins v. Richards*, 97 Tex. 229, 77 S. W. 946.

"It is true that neither charter nor ordinance make any provision for the means whereby the removal of an appointed officer is to be effected; but where a grant of power is given, all the means necessary to effectuate the power pass as incidents to the grant."

Per Sherwood, J., in *State ex rel. v. Walbridge*, 119 Mo. 383, 394, 24 S. W. 457, 41 Am. St. Rep. 663, and note.

51. *State ex rel. v. Walbridge*, 119 Mo. 393, 41 Am. St. Rep. 663, 24 S. W. 457; *Armitage v. Fisher*, 74 N. Y. 167, 26 N. Y. S. 364.

Notice. In the absence of notice to a municipal employee the trial board and civil service commission are without authority to hear or determine charges for his removal. *Chicago v. Gillen*, 222 Ill. 112, 78 N. E. 13; *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575; *Chicago v. Bullis*, 124 Ill. App. 7.

substantial principles of the common law should be observed.<sup>52</sup>

Where a body, as the council is given power to remove after a hearing, such hearing must be before the council itself, and not one of its committees.<sup>53</sup>

Action to remove must be by direct proceedings. Therefore, the qualifications of the members of the city council cannot be investigated in a suit to enforce a contract made by the mayor by virtue of a resolution of the council.<sup>54</sup> So a city clerk cannot be removed by the adoption of a resolution by the council, rescinding its confirmation of his nominations by the mayor, rejecting the nomination, and disapproving his official bond.<sup>55</sup>

Under a charter authorizing the mayor to remove for specified causes officers appointed by him, after an opportunity given such appointee to be heard, and granting an appeal from a conviction to the supreme court, the power of removal of the mayor is not an arbitrary one and can be exercised only after a judicial investigation and the defendant has the right to demand the production of witnesses, to testify under oath, and to cross-examine them and call other witnesses in his defense.<sup>56</sup>

The subject of the removal of public officers from office, either elective or appointive, is within legislative control, and the manner or method prescribed by valid enactments therefor is exclusive.<sup>57</sup>

52. *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128; *State v. Smith*, 72 Conn. 572, 45 Atl. 355.

53. *Jacksonville v. Allen*, 25 Ill. App. 54.

54. *Schwartz v. 32 Flat Boats*, 14 La. Ann. 243.

55. *In re Fitzgerald*, 82 N. Y. S. 811, 88 App. Div. 434.

56. *O'Neil v. Mansfield*, 95 N. Y. S. 1009, 47 Misc. Rep. 516.

57. *State v. Thompson*, 91 Minn. 278, 97 N. W. 887.

A statement of grounds upon which the civil service commission bases the removal of an officer need not be made under civil service laws directing the commission to make and publish rules for removals. *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184.

An order discharging an employee because his services were no longer required does not neces-



Where no provision is made by law as to the number necessary to constitute a quorum in a tribunal for the trial of municipal officers, which consists of three persons, obviously the decision of any two of them is the decision of the tribunal when all have participated in the trial.<sup>58</sup>

### § 564. Same—presentation and sufficiency of charges.

The manner of instituting the proceedings, and those authorized to do so will depend upon the charter and the nature of the accusation.<sup>59</sup> Under some laws the proceeding must be instituted by a public official as a public prosecutor,<sup>60</sup> or by a grand jury.<sup>61</sup>

The charges should be definite and certain, and contain sufficient specifications of the grounds or causes for action, in order to inform fully the accused;<sup>62</sup> however, they need not be drawn with the exactness of pleadings,<sup>63</sup> or with the precision of an indictment or criminal information.<sup>64</sup>

sarily import that his position has been abrogated, or that the department had no longer any work for him to perform, so as to justify his removal without a hearing or without the entry upon the records of the true grounds of removal. *People v. Woodbury*, 92 N. Y. S. 442, 102 App. Div. 462.

58. *State v. Barrett*, 22 Ohio Cir. Ct. Rep. 104, 12 O. C. D. 231.

§ 592 *et seq.*

59. *People v. Gunn*, 85 Cal. 238, 24 Pac. 718.

60. *Bartlett v. State*, 13 Kan. 99.

61. *Crossman v. Leshner*, 97 Cal. 392, 32 Pac. 449.

Verification of charge. *People v. Greene*, 91 N. Y. S. 803, 101 App. Div. 33.

62. *State v. Barrett*, 22 Cir. Ct. Rep. 104, 12 O. C. D. 231; *State v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; *McNiff v. Waterbury*, 82 Conn. 43, 72 Atl. 572.

63. *People v. Thompson*, 94 N. Y. 451.

64. *Lindblom v. Doherty*, 102 Ill. App. 14; *Joyce v. Chicago*, 120 Ill. App. 398, affirmed in 216 Ill. 466, 75 N. E. 184; *State ex rel. v. Whitaker*, 116 La. 947, 41 So. 218; *State v. Superior*, 99 Wis. 612, 64 N. W. 304.

Sufficiency of charge. Where the charge is that the officer became interested in contracts with the city in violation of law a recital that the officer in question violated section (specifying it) in having furnished lumber to the

**§ 565. Same—who may act—composition of tribunal.**

Some authorities hold that a council or other municipal board in proceedings for removal acts judicially, and, therefore, those boards whose members prefer the charges are disqualified from sitting as members of the council or board on hearing them, since they cannot act both as accusers and judges.<sup>65</sup> But the contrary view is usually taken. Thus in a proceeding to remove, members of the council are not disqualified because of the fact that they were members of a committee to investigate and afterwards preferred charges; the fact, that they may have formed an opinion concerning the accused was regarded as immaterial.<sup>66</sup>

Trials on charge before a council are not controlled by the rules that appertain to judicial tribunals. Hence, on the trial of the mayor, the fact that one of the councilmen will act as mayor in event of removal, and the

City of Ballard and having presented a bill to the city for payment by the city of the same, held sufficient although it is not expressly stated that the act was done wilfully. *State v. Ballard*, 10 Wash. 4, 38 Pac. 761.

**Amendment.** Insufficient charges may be amended without notice where the amendments are in the nature of an amplification of the original charges. *People v. Auburn*, 85 Hun (N. Y.) 601, 33 N. Y. S. 165.

**Informal charges.** Under charter providing for the retirement on pension of any veteran serving on the police force, if no charges are pending against the applicant, the police commissioner is not deprived of the right to try charges filed against a veteran by such an application for retirement,

though the charges were not verified as required by rule of police department until after the application was filed. *People v. Greene*, 90 N. Y. S. 162, 97 App. Div. 502, reversing 73 N. E. 1111.

65. *People v. Saratoga Springs*, 39 N. Y. S. 607, 4 App. Div. 399.

Where one who prefers charges and sits at the hearing and his presence is necessary to constitute a quorum, removal by such board is illegal. *People v. Saratoga Springs*, 4 App. Div. 399, 618, 39 N. Y. Supp. 607.

66. *People v. Auburn*, 85 Hun (N. Y.) 601, 33 N. Y. S. 165.

**Aldermen who present charges** against an officer for his removal are not thereby disqualified to participate in the trial of the charges by the council. *Riggins v. Richards*, 97 Tex. 229, 77 S. W. 946.

further fact that another councilman signed the charges, does not prevent either from sitting as councilmen at the trial. The formalities of a criminal court need not be observed.<sup>67</sup> If the charter creating a board makes no provision for disqualifying a member from acting in removal proceedings when he may be biased or prejudiced against the officer on trial, an objection to such member on such ground will not lie.<sup>68</sup> Bias and prejudice on the part of a commissioner not affecting his judgment, will not disqualify him from hearing and determining charges against the chief of the department with a view to his removal.<sup>69</sup>

If the membership of a board is increased by law pending a proceeding to remove an officer, the new member has no right to participate in the trial, even though he had been present at all the sittings of the board and heard all the evidence.<sup>70</sup>

The hearing must be by the officer or tribunal empowered to act. Thus a law authorizing the mayor to remove police officers upon inquiry of the chief of police into the cause therefor, does not confer upon him original jurisdiction to inquire into charges against such officers and to remove an officer upon such inquiry.<sup>71</sup> So, proceedings for the removal of police officers cannot be tried

67. *State ex rel. v. Superior*, 90 Wis. 612, 64 N. W. 304.

Mayor may pass on charges. *State ex rel. v. Wells*, 210 Mo. 601, 109 S. W. 758.

68. *Tibbs v. Atlanta*, 125 Ga. 18, 53 S. E. 811.

69. *People v. Sturgis*, 86 N. Y. S. 687, 91 App. Div. 286.

**Prejudice.** The dismissal of a fireman for a violation of the law and rules, will be affirmed by the court, though the commissioner before whom he was tried was prejudiced where the evidence

proving such violations came from the fireman himself. *People v. Scannell*, 77 N. Y. S. 704, 74 App. Div. 406.

70. *Tibbs v. Atlanta*, 125 Ga. 18, 53 S. E. 811.

A civil service commission having power to create a trial board has by necessary implication authority to change or vary its members at its discretion. *People v. Powell*, 127 Ill. App. 614.

71. *State v. Baldwin*, 77 Ohio St. 532, 83 N. E. 907.

by a deputy police commissioner and the conviction rendered by the commissioner.<sup>72</sup> But under the laws of New York a deputy police commissioner may convict a police officer on charges, and the commissioner may pronounce the judgment.<sup>73</sup> The police commissioner of the City of New York has power to designate a deputy commissioner to hear and investigate charges against police officers and report the same to the commissioner and such designation may be made orally.<sup>74</sup> But under a statute requiring the mayor after the hearing of an officer removed by him, to sign a written order reciting the cause on which such hearing was had, and providing that the mayor's action shall be final if the reasons given are sufficient, the mayor alone can give the decision and such duty cannot be delegated.<sup>75</sup>

Under a charter conferring the power of removal of officers upon the council which was composed of a mayor and aldermen, the aldermen being required to elect the president to act in case of the inability of the mayor, and providing that a majority of the council should constitute a quorum to transact business, and a statute providing that "a joint authority given to any number of persons or officers may be executed by a majority of them unless it is otherwise declared," charges against the mayor may be tried by a majority of the council presided over by its president.<sup>76</sup>

#### § 566. Same—the hearing or trial.

Jurisdiction is essential, to enable the officer or tribunal to proceed legally. In the case of a subordinate tribunal, created by statute, such as the civil service commission, it is fundamental that jurisdiction must

72. *People v. Greene*, 89 N. Y. S. 1067, 97 App. Div. 404.

73. *People v. Partridge*, 83 N. Y. S. 705, 86 App. Div. 310.

74. *People v. Greene*, 183 N. Y.

483, 76 N. E. 614, affirming 94 N. Y. S. 1159, 105 App. Div. 642.

75. *Hill v. Mayor of Boston*, 193 Mass. 569, 573, 79 N. E. 825.

76. *Riggins v. Richards*, 97 Tex. 229, 77 S. W. 946.

affirmatively appear on the face of the proceedings and that no presumption will be indulged in favor of it, as in the case of a court of general jurisdiction.<sup>77</sup>

Laws limiting the time within which charges shall be heard in proceedings to remove public officers are regarded as designed to guarantee the accused the right to a speedy hearing but where the accused appears for and proceeds to trial without objection on account of delay, he cannot thereafter object to the jurisdiction of the court for that reason.<sup>78</sup>

An oath need not be taken by the trying officer, or the members of the board or council,<sup>79</sup> for in such case the officers or members, proceed in the trial of the charges under their official oaths, and, hence, a special oath is not required.<sup>80</sup>

If the accused appears and does not raise the point the fact that the charges were not made under oath as required by law, is not important, as his appearance constitutes a waiver of this formality.<sup>81</sup> So, if an accused appears and answers to verbal charges and after due

77. *Lindblom v. Doherty*, 102 Ill. App. 14, 24.

Equity will not restrain a council, if it has power and the proceedings are regular. *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700.

Proceedings for removal of one interested, contrary to the charter, in contracts for furnishing supplies to the city. *Commonwealth v. Shepp*, 1 Leg. Chron. (Pa.) 325.

The civil service commission has no jurisdiction to investigate charges against a board or members thereof not in the classified service. *Lindblom v. Doherty*, 102 Ill. App. 14, 24.

78. *Folsom v. Conklin*, 3 Cal. App. 480, 86 Pac. 724.

79. *State ex rel. v. Superior*, 90 Wis. 612, 64 N. W. 304.

Oath. An ordinance providing for removals from the police department by the board of aldermen is not unconstitutional in not requiring the aldermen to be sworn before proceeding with the trial. *Lowery v. Central Falls*, 23 R. I. 354, 50 Atl. 639.

Administration of oaths when required cannot be by clerk of a board of aldermen although he is a notary public. *Tompert v. Lithgow*, 1 Bush. (64 Ky.) 176.

80. *State v. Noblesville*, 157 Ind. 31, 60 N. E. 704.

81. Such proceedings are not criminal proceedings. *Osterreich v. Fowle*, 132 Mich. 9, 92 N. W. 497, 9 Det. Leg. N. 496.

hearing is removed, he will not be heard to complain three months later that under the law he was entitled to a hearing upon notice and written charges.<sup>82</sup> So it has been held that, failure to present as a defense legal prohibition against removal except for "cause" by one so protected because of service in a particular department will constitute waiver.<sup>83</sup>

In proceedings to remove the accused has the right to be confronted by his accusers, and statements made in his absence are not admissible as evidence against him.<sup>84</sup>

Usually the evidence is presented under oath,<sup>85</sup> and the accused may be represented by counsel, however, refusal to permit counsel to be present and participate in the defense has been held not alone sufficient to invalidate such proceedings.<sup>86</sup>

Adjournments of the hearing from time to time are within the reasonable discretion of the officer or body trying the charges.<sup>87</sup>

The tribunal may hear all the evidence at one time and pass on the case at another time, provided, of course, all of the members heard the case.<sup>88</sup>

82. *People v. Bense*, 106 N. Y. S. 110, 121 App. Div. 478, affirmed in 190 N. Y. 526, 83 N. E. 1129.

83. *People v. Porter*, 90 Hun (N. Y.) 401, 35 N. Y. S. 811.

Defense of laches. Failure to bring charges against a patrolman for his removal until twenty-three months after the offense charged was committed will not sustain a defense of laches where it does not appear when knowledge thereof came to the official preferring the charge. *Chicago v. Bullis*, 124 Ill. App. 7.

84. *People v. McAdoo*, 105 N. Y. S. 599, 121 App. Div. 178.

85. Hearing witnesses—oath. A proceeding before commissioners at which no witnesses

were sworn and the accused merely appeared and made an unsworn statement in his own behalf and answered questions put by two of the commissioners, was held not a hearing under the statutes. *People v. Wells*, 83 N. Y. S. 789, 86 App. Div. 270, reversing 68 N. E. 883.

Witness, sworn by chairman of committee of whole, was duly sworn. *State ex rel. v. Superior*, 90 Wis. 612, 64 N. W. 304.

86. *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

87. *People v. Greene*, 88 N. Y. S. 1060, 96 App. Div. 1.

88. *State ex rel. v. Board of Police Commissioners*, 113 La. 424, 37 So. 16.

### § 567. Same—the evidence.

In the proceeding to remove an officer the trial may be more informal than in regular court proceedings, and more latitude may be permitted in the admission and consideration of evidence.<sup>89</sup> While the tribunal in hearing charges is not bound to observe the technical rules of evidence, it ought not to abuse its discretion in admitting or excluding evidence.<sup>90</sup>

Real evidence may be received. Thus in proceedings before a council to remove the commission of parks for gross neglect of duty in connection with public work, the council may, in the presence of the commissioner's counsel, examine the work in order to better understand the evidence.<sup>91</sup>

Of course, the credibility of the witnesses and the weight to be given to the testimony is within the province of the trying officer or tribunal.<sup>92</sup> In proceedings to remove an officer on charges involving the commission of a felony, the accused is entitled to the same presumptions in his favor as if the same charge had been made against him in a criminal court.<sup>93</sup> Thus in a hearing to remove an officer on the charge of perjury obviously the sufficiency of the evidence depends upon the question

89. *McNiff v. Waterbury*, 82 Conn. 43, 72 Atl. 572; *People v. Peck*, 76 N. Y. S. 328, 73 App. Div. 89.

In proceedings to remove a fireman the one making the charges may testify, though his name is not given as one of the witnesses. *People v. Scannell*, 80 N. Y. S. 685, 80 App. Div. 320.

90. *People v. Sturgis*, 86 N. Y. S. 687, 91 App. Div. 286.

**Evidence.** Burden of proof. *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135; *People ex rel. v. Baker*, 123 N. Y. S. 493, 495, 139 App. 148.

The fact that an officer accepted

other employment is not admissible as evidence against him. *Morley v. New York*, 58 Hun (N. Y.) 610, 12 N. Y. S. 609.

Whether acceptance of other work constitutes abandonment of position is a question of fact. *Wardlaw v. New York*, 137 N. Y. 194, 33 N. E. 140.

91. *Bolger v. Common Council*, 153 Mich. 540, 117 N. W. 171, 15 Det. Leg. N. 516.

92. *People v. Greene*, 184 N. Y. 565, 76 N. E. 1103, affirming 94 N. Y. S. 477, 106 App. Div. 230.

93. *People v. Sturgis*, 96 N. Y. S. 1046, 110 App. Div. 1.

whether a verdict of a jury against such officer on his trial for perjury would be set aside as not warranted by the evidence.<sup>94</sup>

### § 568. Same—judgment and record.

There should be a finding of guilty or not guilty on the charges. Ordinarily a sentence of dismissal will be illegal without a finding of guilty. But the judgment dismissing the officer need not have the precise accuracy of a record in a criminal case.<sup>95</sup>

The record of the proceedings of removal, should show affirmatively: (1) that charges sufficient in law were preferred; (2) that due notice was given; (3) that a trial was had where the officer was permitted to be heard; and (4) that a judgment or order for cause was rendered.<sup>96</sup>

As above stated, no intendments can be indulged as to the jurisdiction and regularity of the proceedings of an inferior tribunal.<sup>97</sup> Thus, in a proceeding by a city

94. *People v. Sturgis*, 96 N. Y. S. 1046, 110 App. Div. 1.

Right of a fire commissioner, after hearing charges against a subordinate, to discuss the record with the corporation counsel to determine the competency of the evidence. *People v. Sturgis*, 86 N. Y. S. 687, 91 App. Div. 286.

95. *State ex rel. v. Board of Police Commissioners*, 109 La. 368, 33 So. 372; *People v. Scannell*, 80 N. Y. S. 685, 80 App. Div. 320.

**Sufficiency of finding illustrated.** Under a charter authorizing the police commissioner to dismiss police officers upon conviction of misconduct after a trial before one of the deputy police commissioners, a recommendation of such deputy after a trial that the accused be dismissed, is equivalent to a finding of guilty

on the charge for which he was tried. *People v. Partridge*, 84 N. Y. S. 487, 87 App. Div. 573.

Where a council by resolution removes a commissioner of parks, on charges, it is not necessary that a separate vote shall be taken on each charge and on the question of removal. *Bolger v. Common Council*, 153 Mich. 540, 117 N. W. 171.

An order removing a member of the fire department upon finding him guilty of charges need not state whether or not he was found guilty under all of the specifications. *People v. Sturgis*, 88 N. Y. S. 631, 96 App. Div. 620, 183 N. Y. 540, 76 N. E. 1105.

96. *State ex rel. Brennan v. Walbridge*, 62 Mo. App. 162.

97. § 566 *ante*.



council, for removal of an officer for misconduct in office, the specific act complained of should be stated, in order that it may appear as a matter of law that such body had jurisdiction of the offense.<sup>98</sup>

Some laws prescribe official notice to the officer of his removal. Under a law requiring a village president to notify the removed officer, in order to render the action effective, such notice signed by the village clerk only is not notice of any action by the village president, and is therefore insufficient.<sup>99</sup> However, an official notice to an officer of his removal which is otherwise valid, is not invalidated by the superfluous signature of another officer.<sup>1</sup>

### § 569. Judicial review of removal proceedings.

Where the removing authority has power to remove an officer at pleasure, ordinarily a removal by it is not reviewable by the courts.<sup>2</sup> And if a legal removal may be made for cause, without notice and hearing the courts will not review such action in those jurisdictions where the action of removal is regarded as an administrative, not a judicial, function.<sup>3</sup> As a rule, discretionary action relating to removal and suspension of officers is not subject to judicial review,<sup>4</sup> as the decisions amply illus-

98. *State ex rel. v. Lupton*, 64 Mo. 415.

99. *Kriseler v. Le Valley*, 122 Mich. 576, 81 N. W. 580.

1. *State ex rel. v. Longfellow*, 95 Mo. App. 668, 69 S. W. 596.

2. *People v. Ham*, 69 N. Y. S. 283, 59 App. Div. 314.

3. *In re Carter*, 141 Cal. 316, 74 Pac. 997.

4. *State v. Register*, 59 Md.

283; *People v. Fire Commissioners*, 100 N. Y. 82, 2 N. E. 613.

When governor has power to remove police commissioners his decision is conclusive. *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *People v. Martin*, 19 Colo. 565, 24 L. R. A. 201, 36 Pac. 543.

If the statute provides for none, none allowed. *Walsh v. Johnston*, 18 R. I. 88, 25 Atl. 849.

trate.<sup>5</sup> So the motive actuating councilmen in removing an officer from an office, the tenure of which is at its pleasure, are not ordinarily subject to judicial inquiry, and in the absence of fraud or deception courts will not

5. Discretionary removals are not reviewable by the courts. Where a charter provides that any officer appointed by the mayor may be removed by him for such cause as he shall deem sufficient and shall assign in his order of removal, and the mayor removed an assessor from office, and assigned "the good of the service," as cause, his action cannot be reviewed since the cause assigned is sufficient as a matter of law. *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612.

The removal, for incompetency, by the comptroller, of a collector of city revenues will not be disturbed where he offered no explanation for inability to balance his books, and could not add correctly his collections. *People v. Coler*, 159 N. Y. 569, 53 N. E. 1094.

Charges against an inspector of buildings that he has demanded money to influence his official action, that he had been intoxicated while on duty, and had assaulted the informer, being substantial, and the officer having been given opportunity to explain, the sufficiency of the explanation rested entirely with the removing officer, and his action will not be disturbed on appeal. *People v. Brady*, 62 N. Y. S. 603, 48 App. Div. 128.

In proceedings for the removal

of a fireman before the board of fire commissioners the question whether an excuse offered by him was sufficient to exonerate him is for such board to determine. *Ryan v. Handley et al.*, 43 Wash. 232, 86 Pac. 398.

And where a charter makes such board responsible for the efficient working of the fire department, and provides that charges preferred against a member thereof shall be established to the satisfaction of the board, its judgment in removing a member upon charges regularly preferred, and an opportunity given to defend, is not subject to review by the courts. *Ryan v. Handley*, 43 Wash. 232, 86 Pac. 398.

Where a council is authorized by statute to remove police constables for misconduct or incapacity of such character as the council may deem a disqualification for the office, the nature of such power is not such that an appellate court can exercise, and no appeal will lie from such a removal. *Donahue v. Town Council, etc.*, 25 R. I. 79, 54 Atl. 933.

Where the removal of an employee has been sustained by the civil service commission the proceedings will not be reviewed by the courts. *Price v. Seattle*, 39 Wash. 376, 81 Pac. 847.

interfere with the declaration of discretionary municipal pleasure by the council.<sup>6</sup>

Some laws provide that the decision of the removing officer or agency shall be final, and not subject to judicial review.<sup>7</sup> If jurisdiction to hear and determine sufficiently appears and the proceedings were according to law, the courts will decline to review;<sup>8</sup> however, this does not preclude a review when the proceedings are not in accordance with the procedure prescribed by law.<sup>9</sup> Thus where

6. *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057.

Where the act of a council is the exercise of legislative power its intent in abolishing an office will not be inquired into by the courts. *Downey v. State*, 160 Ind. 578, 67 N. E. 450.

7. **Right of review.** When a statute prohibits an appeal from the decision of the mayor removing an officer an application for a revision of the decision as permitted by statute in civil cases will be denied. *Dow v. Casey*, 194 Mass. 48, 79 N. E. 810; *Pearson v. Casey*, Id.; *Beals v. Casey*, Id.

If the proceeding is a judicial action a statute authorizing it, which fails to provide for appeal to or review by the courts is void under the Organic Act of Oklahoma vesting the entire judicial power of the territory in courts. *Christy v. Kingfisher*, 13 Okl. 585, 76 Pac. 135.

8. *Feldman v. Chicago*, 126 Ill. App. 186; *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184; *Joyce v. Chicago*, 120 Ill. App. 398; *People v. Chicago*, 234 Ill. 416, 84 N. E. 1044; *Chicago v. People*, 210 Ill. 84, 71 N. E. 816; *Heaney v. Chicago*, 117 Ill. App. 405.

**No right of review.** The action of the council in removing a police officer is beyond the control of a court of equity where the accused had reasonable notice before he was tried, which specified the cause for which he was to be tried, and the cause itself was a legal cause. *Thomas v. Thompson*, 31 Ky. L. Rep. 524, 102 S. W. 849.

Under a charter providing that the police commissioner, may on conviction of any member of the police force punish such member by dismissal, a judgment of dismissal imposed upon one properly convicted will not be reviewed by the court on the ground that the punishment is excessive. *People v. Greene*, 87 N. Y. S. 1017, 94 App. Div. 287.

9. *People v. Peck*, 76 N. Y. S. 328, 73 App. Div. 89.

**Review permitted.** *People v. Roosevelt*, 168 N. Y. 488, 61 N. E. 783; *People v. York*, 169 N. Y. 578, 61 N. E. 1133.

Review of proceedings of removal. *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429.

Review of proceedings of removal where term has expired. *Attorney General v. Remick*, 71 N. H. 480, 53 Atl. 308.

the decision of a police commissioner in removing a police officer is final, it will be set aside by the court only when some essential formality has been omitted or where the commissioner has acted arbitrarily.<sup>10</sup> But an allegation that the commissioner was mistaken in his conclusion of fact states no ground for review.<sup>11</sup> So where a hearing is given by statute and the body charged with giving it has acted without it or refused it, the proceedings will be set aside.<sup>12</sup>

Usually the courts will assume jurisdiction to determine the sufficiency of the charges, and to ascertain whether the removing officer or body had jurisdiction and whether the proceedings were conducted legally. Ordinarily the evidence will be examined by the court only for the purpose of ascertaining whether it furnished any substantial basis for the removal.<sup>13</sup>

### § 570. Consideration by courts in reviewing removal proceedings—practice.

If the proceeding in the removal of the officer is irregular, in violation of law, or the officer or tribunal acting

Suspension of policeman after term of office expired sustained irrespective of question whether or not it was in accordance with charter. *Houston v. Albers*, 32 Tex. Civ. App. 70, 73 S. W. 1084.

Appeal from action of council in removing a policeman for misconduct denied. *Donahue v. Cumberland*, 25 R. I. 79, 54 Atl. 933.

Validity of removal. *People v. Butler*, 107 N. Y. S. 833, 122 App. Div. 790.

In proceedings in New York before the commissioner of public safety for the removal of an officer, the refusal of the commissioner to postpone the trial is reviewable by the court, even though the determination of the

cause by such commissioner is not *People v. Webster*, 90 N. Y. S. 723, 98 App. Div. 581.

10. Appeal of *Pierce*, 78 Conn. 666, 63 Atl. 161; *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

11. Appeal of *Pierce*, 78 Conn. 666, 63 Atl. 161.

12. *Bowlby v. Dover*, 68 N. J. L. 97, 52 Atl. 289; *Dodd v. State Board of Health*, 38 Vroom (N. J.) 463.

13. *Louisiana*. *State v. Mayor*, 43 La. Ann. 92, 8 So. 893.

*Minnesota*. *State v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118.

*Missouri*. *State ex rel. v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.

is without jurisdiction the removal will be set aside by the courts.<sup>14</sup> Thus where the hearing was before a deputy who passed on the evidence, and the charges and evidence in supporting the same were not passed upon by the officer removing, the removal is illegal.<sup>15</sup> So the dismissal of an officer by a commissioner is invalid in so far as it is based on proceedings had before his predecessor in which there had been no final judgment.<sup>16</sup> So if the evidence is insufficient to sustain the charges the removal will be held void.<sup>17</sup> But proceedings to remove an officer are not reviewable by the court where the evidence, if believed, would be sufficient to support an order of removal.<sup>18</sup> Thus the proceedings of a body having authority to remove a policeman will not be reviewed if he has been tried for a specific offense and the evidence justifies the conviction.<sup>19</sup> So the decision of a city council removing the mayor for cause will not be disturbed by the court where the court is unable to say that no evidence was introduced which the council might fairly have found sufficient to support the removal.<sup>20</sup> But in the trial of an officer, as a policeman, for a breach of duty, a finding by the commissioner which is against the weight of the evidence is not conclusive on the courts.<sup>21</sup>

14. Appeal brings before the court only the validity of the proceedings required by law before removal is made, and the wisdom or reasonableness of the decision of removal will not be reviewed. *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

15. *People v. McAdoo*, 110 N. Y. S. 140, 125 App. Div. 673.

16. *In re Elder*, 103 N. Y. S. 617, 118 App. Div. 25.

17. *State ex rel. v. Mayor*, 43 La. Ann. 92, 8 So. 893; *In re Nichols*, 57 How. Pr. (N. Y.) 395, 6 Abb. N. C. 474; *People v. Nichols*, 58 How. Pr. (N. Y.) 200.

18. *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429; *People v. Partridge*, 84 N. Y. S. 779, 88 App. Div. 60.

19. *Marran v. Common Council* (N. J. Sup. 1905), 61 Atl. 13.

See *Chicago v. Campbell*, 118 Ill. App. 129.

20. *Riggins v. Waco*, 100 Tex. 32, 93 S. W. 426, 90 S. W. 657.

21. *People v. Partridge*, 88 N. Y. S. 657, 95 App. Div. 323; *People v. Greene*, 88 N. Y. S. 1060, 96 App. Div. 1.

**Weight of evidence** will not be reviewed, but if it appears that the officer was negligent the find-

§ 571. *Certiorari* to review proceedings are sanctioned in most jurisdictions.<sup>22</sup>

A trial conducted in accordance with a law providing for the removal of officers is usually regarded as a *quasi*-criminal proceeding and may be reviewed by writ of

ing will be sustained. *State v. Jersey City*, 54 N. J. L. 310, 23 Atl. 666.

Evidence in these cases examined and held insufficient to warrant the removal of police officers. *People v. Greene*, 85 N. Y. S. 866, 89 App. Div. 296; *People v. Greene*, 87 N. Y. S. 172, 92 App. Div. 243.

Evidence sufficient. *People v. Partridge*, 87 N. Y. S. 19, 91 App. Div. 557.

Bad faith in removing an employee for the purpose of keeping expenses within an appropriation, will not be inferred from the fact that the department did not exhaust its entire salary appropriation for the year but carried over a surplus. *People v. Department of Health*, 176 N. Y. 602, 68 N. E. 1123, affirming 83 N. Y. S. 800, 86 App. Div. 521.

**Non-appearance of accused—notice.** A judgment of a police commissioner removing a police officer will not be set aside on the ground of illness and non-appearance of the officer, where he knew the day before the hearing that he would be unable to appear, and made no effort to obtain an adjournment. *People v. Bingham*, 117 N. Y. S. 429, 132 App. Div. 667.

22. *Gill v. Brunswick*, 118 Ga. 85, 44 S. E. 830; *Macon v. Shaw*, 16 Ga. 172; *Bradshaw v. Camden*,

39 N. J. L. 416; *People v. New York*, 19 Hun (N. Y.) 441; *People v. Cooper*, 21 Hun (N. Y.) 517; *People v. Nichols*, 79 N. Y. 582; *People v. York*, 173 N. Y. 610, 66 N. E. 1114; *People v. Sagne*, 74 N. Y. S. 161, 68 App. Div. 643.

**Certiorari.** The failure of a superintendent of buildings to take the official oath prescribed by charter before he entered on his duties does not deprive him of a standing to contest by *certiorari* his attempted removal. *Peal v. Newark*, 66 N. J. L. 265, 49 Atl. 468; *O'Rourke v. Newark*, 66 N. J. L. 109, 49 Atl. 468, affirming 48 Atl. 576, reversing 48 Atl. 578.

In an appeal to the supreme court from the mayor's action in removing an officer, it is proper procedure to order the mayor to certify and return to the court a record of his proceedings in relation to such removal, and to show cause why the appeal should not prevail and why the removal proceedings should not be reversed and set aside. *O'Neil v. Mansfield*, 95 N. Y. S. 1009, 47 Misc. Rep. 516.

Review of, by *certiorari*, denied. *Lorbeer v. Hutchinson*, 11 Cal. 272, 43 Pac. 896. If there has been no judicial determination, there can be no review. The writ issues for review of some judicial and not official executive or ministerial

*certiorari*.<sup>23</sup> It has been ruled that even a provision of a municipal charter that "each board shall be the sole judge of the qualifications, election and returns of its own members," does not divest the courts of their supervisory control by *certiorari* in passing upon the regularity of the proceedings.<sup>24</sup>

The common-law writ of *certiorari* will lie to review the removal by the civil service commissioners of an officer appointed under civil service rules.<sup>25</sup>

A writ of *certiorari* is not a writ of right and its issue upon a petition therefor is in large measure discretionary with the court.<sup>26</sup>

*Certiorari* proceedings to review the removal of an officer are instituted within the meaning of the law, when the petition is presented to the court, without reference to the time of the service of the writ.<sup>27</sup>

A long delay in making an application for *certiorari* will prevent review.<sup>28</sup> But mere lapse of time alone, short of the limitation for the prosecution of a writ of error, will not bar the issuing of the common-law writ of *certiorari*; however, where a detriment or inconvenience to the public will result, any unreasonable delay will war-

act. *Ryan et al. v. Gaynor*, 122 N. Y. S. 94, 66 Misc. Rep. 481.

A deputy tax commissioner of New York, though a veteran, is not entitled to a hearing upon charges before being removed, and a writ of *certiorari* to review his removal will not lie. *People v. Wells*, 176 N. Y. 462, 68 N. E. 883, rehearing denied, 70 N. E. 218.

A granting of a trial to a civil service employee to which he was not entitled, does not afford ground for a *certiorari* to review his removal prior to such trial. *People v. Hynes*, 91 N. Y. S. 1032, 101 App. Div. 453.

23. *Gill v. Brunswick*, 118 Ga. 85, 44 S. E. 830.

24. *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784.

25. *Chicago v. Condell*, 224 Ill. 595, 79 N. E. 954; *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575.

*Certiorari* will lie to review the removal of an officer in the civil service, who is a veteran fireman, when made without the hearing required by civil service laws. *People v. Wells*, 83 N. Y. S. 789, 86 App. Div. 270.

26. *Chicago v. Condell*, 224 Ill. 595, 79 N. E. 954.

27. *People v. McAdoo*, 110 N. Y. S. 140, 125 App. Div. 673.

28. *People v. Fire Commissioners of N. Y.*, 77 N. Y. 605.

rant the refusal of the writ.<sup>29</sup> A delay of one year and a half after the removal of a policeman before filing a petition for *certiorari* to review the proceedings is unreasonable and will result in a denial of the writ, where there is no justification for the delay.<sup>30</sup> So the failure for fifteen months to apply for a writ of *certiorari* without a sufficient excuse for the delay, is unreasonable though the position remained vacant.<sup>31</sup>

On *certiorari* to test the legality of the removal of an officer by the civil service commission evidence *aliunde* the record can not be heard.<sup>32</sup> Nor will the court hear evidence relative to questions raised or heard upon the trial of the original proceeding.<sup>33</sup>

The determination of a commissioner dismissing an officer for neglect of duty will be reversed on review by *certiorari*, if it would have been set aside as against the weight of the evidence, had it been the verdict of a jury.<sup>34</sup> But a writ of *certiorari* to review removal proceedings had before a board of police commissioners should be dismissed and the decision of the board affirmed, where it appears from the decision and proceedings that such decision as to guilt is based upon the proofs adduced, though the official record of such officer may have been considered in determining his punishment.<sup>35</sup> However, where a petition for *certiorari* alleges facts showing that a police commissioner's determination of an officer's guilt and removal was induced by

29. *Chicago v. Condell*, 224 Ill. 595, 79 N. E. 954.

30. *Chicago v. Condell*, 224 Ill. 595, 79 N. E. 954.

31. *Glori v. Board of Police Commissioners*, 72 N. J. L. 131, 60 Atl. 47.

32. *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184.

33. *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184.

34. *People v. Monroe*, 94 N. Y. S. 366, 106 App. Div. 607; *People v. Greene*, 90 N. Y. S. 194, 98 App. Div. 620.

35. *People v. Roosevelt*, 168 N. Y. 488, 61 N. E. 783, affirming 40 N. Y. S. 1147.



threats and there is no denial of such allegations the determination will be annulled.<sup>36</sup>

On *certiorari* to review removal proceedings, the writ will be dismissed where the return thereto is defective in not setting out the rules which the relator was charged with violating, and it appears that the removal was for cause after a fair trial.<sup>37</sup>

### § 572. Mandamus to review removal proceedings—reinstatement.

Laws frequently make provisions for the reinstatement of officers and employees who have been removed, suspended or discharged. When certain conditions are specified in such laws they must be observed, to authorize reinstatement.<sup>38</sup>

36. *People v. Monroe*, 89 N. Y. S. 929, 97 App. Div. 283.

37. *People v. Sagne*, 74 N. Y. S. 161, 68 App. Div. 643.

38. Proceedings for reinstatement—illustrations. The classification of a civil service commission cannot be called in question collaterally by a person seeking restoration to a position. *People v. McAdoo*, 99 N. Y. S. 324, 113 App. Div. 770.

The present incumbent of a position from which relator was removed is not a necessary party to *mandamus* to compel relator's reinstatement. *People v. Ahearn*, 98 N. Y. S. 492, 111 App. Div. 741.

A suspended attendance officer, erroneously placed by the civil service commission on the list for reappointment cannot maintain proceedings for reinstatement. *People v. Board of Education*, 83 N. Y. S. 803, 86 App. Div. 537.

Where a police constable was

dismissed, and reported for duty on the three following days but was told by the chief it was useless for him to do so, he was not required to make further tender of his services to entitle him to maintain proceedings for reinstatement. *Lowery v. Central Falls*, 23 R. I. 354, 49 Atl. 963, 50 Atl. 639.

A veteran, who is discharged by the comptroller for reasons of economy and because he was the least efficient clerk in the office, is entitled to reinstatement on making known to the comptroller the fact that he is a veteran. *Stutzbach v. Coler*, 70 N. Y. S. 901, 62 App. Div. 219, 61 N. E. 697.

A janitor who resigned his position to which he was appointed at a time when such position was not in the civil service, cannot be reinstated unless he passes the examination required by civil service rules. *People v. Knox*, 73 N. Y. S. 361, 66 App. Div. 517.

*Mandamus* will lie to compel reinstatement in a proper case. If appeal from a removal proceeding is allowed, *mandamus* to compel reinstatement prior to appeal will not lie.<sup>39</sup> So, if the term of office is fixed and has expired, *mandamus* to compel reappointment will be denied, for in such case the officer is not "removed."<sup>40</sup> So in case of the abolition of an office or place in good faith reinstatement will be denied; but the law is otherwise if the office or place is not abolished in good faith, but is merely colorable.<sup>41</sup> So, if an officer resigns he is not entitled

A discharged patrolman must show, in an action of *mandamus* to compel reinstatement, that he was an officer *de jure*. *Moon v. Champaign*, 116 Ill. App. 403, 73 N. E. 408, 214 Ill. 40.

A suspended employee who is subsequently taken off the suspended list and entitled to reinstatement is not required to make a demand for reinstatement before bringing *mandamus*. *People v. Grout*, 90 N. Y. S. 861.

In *certiorari* by an officer for reinstatement to a position, where it appears that a new appointee has been inducted into office the writ of *certiorari* will be dismissed. *Magner v. Bayonne*, 74 N. J. L. 185, 64 Atl. 993.

39. *People v. White*, 69 N. Y. S. 30, 59 App. Div. 17.

40. In re *Tiffany*, 179 N. Y. 455, 72 N. E. 512, affirming 84 N. Y. S. 1148.

41. Place abolished—good or bad faith? Where an office was abolished by a board of fire commissioners and the officer removed and immediately after such removal and at the same meeting of the board, another office was created having the same duties,

the change was merely colorable and such officer is entitled to reinstatement. *People v. Coleman*, 91 N. Y. S. 432, 99 App. Div. 88.

A bridge tender whose position is abolished by the tearing down of the bridge is not entitled under civil service laws to a writ of *mandamus* to compel his reinstatement to such position or his transfer to some other branch of the civil service; upon the ground that he is a veteran fireman. *People v. Lindenthal*, 173 N. Y. 524, 66 N. E. 407, reversing 79 N. Y. S. 838.

Under the New York charter an employee in the civil service is deemed suspended when his position is abolished, and he is entitled to reinstatement in the same department, when the head of such department decides there is need for his services. And in the absence of bad faith such decision is not reviewable by the courts. *People v. Stewart*, 48 N. Y. S. 473, 75 App. Div. 497.

Where a position has been abolished and the employee who is a veteran was certified to the civil service commission and subsequently appointed by it to fill a

to *mandamus* to compel reinstatement.<sup>42</sup>

*Mandamus* will lie to compel the reinstatement of a veteran employee who has been wrongfully discharged, where there is no adequate remedy at law.<sup>43</sup> The rule that the title to an office cannot be tried by *mandamus* applies only to public offices and not to the position of clerks and employees.<sup>44</sup> The right of a veteran who has been wrongfully discharged, to a writ of *mandamus* to compel his reinstatement is not lost by the fact that he had previously brought suit for wages lost while he was excluded from employment.<sup>45</sup>

vacancy he cannot maintain *mandamus* to compel reinstatement of his original position on the ground that the notice stated he was removed instead of suspended. *People v. Monroe*, 90 N. Y. S. 907, 99 App. Div. 290.

See § 557 *ante*.

42. *People v. Sturgis*, 78 N. Y. S. 1037, 77 App. Div. 636.

*Mandamus*. Under a statute vesting the power of appointment and removal of election commissioners solely in the mayor, the election department of a city cannot be compelled by *mandamus* to restore to office an election commissioner removed by the mayor. *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429.

In one case a city councilman was expelled on charges which were not formulated or made known to him with substantial certainty, and he objected to being tried on that ground, was denied the benefit of counsel while able counsel conducted the prosecution, was wholly unprepared at the trial

and without witnesses, and it was properly held that he would be restored by *mandamus* upon timely application. *State ex rel. v. New Orleans*, 107 La. 632, 32 So. 22.

43. *Iowa*. *Shaw v. Marshalltown*, 131 Iowa 128, 104 N. W. 1121.

*Massachusetts*. *Ransom v. Boston*, 193 Mass. 537, 79 N. E. 823; *Sims v. O'Meara*, 193 Mass. 547, 79 N. E. 824.

*New York*. *Sullivan v. Gilroy*, 8 N. Y. S. 401, 55 Hun 285; *In re Ostrander*, 34 N. Y. S. 295; *People v. Sutton*, 34 N. Y. S. 487; *People v. Morton*, 49 N. Y. S. 760; *People v. Hayes*, 94 N. Y. S. 754.

44. *People ex rel. v. Sutton*, 34 N. Y. S. 487.

A veteran may compel by *mandamus* the restoration of his salary where the same has been wrongfully reduced. *Hilton v. Cram*, 97 N. Y. S. 1123, 112 App. Div. 35.

45. *Ransom v. Boston*, 193 Mass. 537, 79 N. E. 823.

## CHAPTER 13.

MEETINGS AND PROCEEDINGS OF COUNCIL OR GOVERNING  
LEGISLATIVE BODY.

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Sec.	Sec.
609. Reasons for requiring yeas and nays.	613. Power to rescind prior acts.
610. Reading bills on three different days.	614. Rescinding votes in electing and appointing officers.
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612. Reconsideration — general powers respecting.	616. Power to commit for contempt.

### § 573. Municipal organization—where corporate authority vested.

With respect to the enactment of ordinances and by-laws, in this country, corporations invested with the power of local civil government may be classed under two heads: *First*, the *New England town*, in which the inhabitants thereof meet, act and vote as individuals clothed with the full powers of the corporation; *second*, the *municipal corporation proper*, in which the inhabitants are represented in their corporate capacity by certain officers or agents constituting the corporate authority. In the latter form these officers or agents are not the corporation, nor do they constitute a corporation of any character. They merely act as the servants and agents of the inhabitants of the place, who, in conjunction with the territory, constitute the corporation.<sup>46</sup> The inhabitants exercise their corporate franchises by the selection of the officers who represent them, and the latter constitute the corporate authorities in whom are vested, for the time being, the powers of the corporation. It is by and through such officers and agents that the corporation acts in all things.

The executive and administrative affairs are generally in the hands of a chief executive (commonly called a mayor) and other chief officers elected by the people at large or appointed, and in the larger cities usually

46. § 116, *ante*.

While the mayor and members of the council are regarded as public trustees in a general sense;

they are not so technically, so as to subject them to chancery control, as ordinary trustees. *Semmes v. Columbus*, 19 Ga. 471.

specified functions, as education, sanitation, public charities, public work, etc., are committed to administrative and executive boards and departments.<sup>46a</sup>

The legislative powers are conferred upon particular officers, elected by the voters at large, or by wards or municipal subdivisions, variously designated as aldermen, delegates, councilmen, selectmen, trustees, supervisors, etc., who constitute the legislative or governing body, commonly called the council or common council. This latter body is sometimes composed of two houses, branches or boards, and the concurrence of both is ordinarily required to complete any given corporate action, especially acts considered purely legislative, as in the passage of ordinances, or by-laws, regulations and resolutions of a permanent nature; and to constitute the given act the legal action of the corporation, the approval of the mayor is frequently required. Thus where the charter commits the powers of the corporation to the mayor and council, or governing body, the latter may not exercise the corporate powers without the concurrence of the mayor in the manner prescribed.<sup>47</sup>

Various forms of municipal organization, showing where corporate authority is vested, are indicated in the notes.<sup>48</sup> and in chapter 9, relating to the municipal

46a. § 432 *et seq. ante*.

47. *Saxton v. Beach*, 50 Mo. 488.

See ch. 16 *post*.

48. *Alabama*. In a few states, as in Alabama, the corporate authority of towns is vested in an intendant and aldermen (usually five). Civil Code Ala. 1896, § 2942. The intendant has the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising within the corporate limits. Civil Code Ala. 1896, § 2951.

*California*. In San Francisco the governing legislative body is denominated the board of super-

visors. Charter of San Francisco, art. II, ch. 1, § 1; Statutes and Amendments to Codes of Cal. (1899), p. 244.

The board of trustees is the legislative body of municipal corporations of the sixth class in California. *Mintzer v. Schilling*, 117 Cal. 361, 49 Pac. 209.

*Colorado*. It seems that the Constitution of Colorado does not imperatively require local aldermanic representation in towns or cities. *Valverde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208.

*Massachusetts*. In Massachusetts the mayor, aldermen and

charter, the municipal organizations of a few leading cities are treated.

The legislative body, in small places, is usually composed of a single chamber, and at present the tendency in general is against the bicameral system. The dual

common council possess all powers of the city as a municipal corporation, except those specially reserved by charter to be exercised by the people. The body may accept a charter. *Central Bridge Corporation v. Lowell*, 15 Gray (Mass.) 106, 116.

*Missouri.* In Kansas City the common council is composed of two houses known as the upper and lower house. *Charter Kansas City*.

The organization of St. Louis is explained elsewhere. § 325 *et seq. ante*.

*New Hampshire.* In New Hampshire, by express statutory provision the administration of all fiscal, prudential and municipal affairs of a city, and the government thereof, are vested in the council, and all powers vested by law in towns, or in the inhabitants thereof, are exercised by the city councils. *Perry v. Keene*, 58 N. H. 40.

These provisions are not modified by a general statute which requires the mayor and aldermen to call a general meeting of the inhabitants for any purpose not unconstitutional or otherwise illegal, when requested to do so in writing by one hundred legal voters. "And there is not sufficient ground for holding this section to be an implied qualification of the sections which transfer to

city councils the power of municipal legislation and administration." *Kelley v. Kennard*, 60 N. H. 1, 3.

Even a vote concerning the construction of a highway, passed at a meeting of the inhabitants of a city does not control the action of the city council; it is merely advisory. *Ib.*

*Ohio.* In the principal cities of Ohio the legislative body is known as the house of legislation.

*Virginia.* *Kirkham v. Russell*, 76 Va. 956, 958.

*West Virginia.* *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; 20 Am. & Eng. Corp. Cas. 111.

*Town.* In the towns of New England the legislative body is usually composed of selectmen, and in the New England cities, of aldermen. *McFarland v. Gordon*, 70 Vt. 455, 456, 41 Atl. 507.

In Vermont a town agent may employ legal services in behalf of the town. *Langdon v. Castleton*, 30 Vt. 285.

But a prudential committee of a school district has no such authority, without a vote of the district. *Harrington v. Alburgh School District*, 30 Vt. 155.

Powers of New England towns, §§ 338, 339, *ante*.

*Township.* Under a statute conferring corporate powers in general upon "townships," the power

form exists in many cities and towns in Pennsylvania and in New England, also, in Buffalo, Philadelphia, Baltimore, Louisville, Portland (Me.) and St. Louis. A single house exists in Chicago, Detroit, Indianapolis, Los Angeles, New Orleans, New York and San Francisco.<sup>49</sup>

The terms of the members of the legislative bodies vary from one to four years. They are elected either at large or by wards or municipal subdivisions. The councils also vary as to the number of members. In Europe the councils are usually larger than in this country.<sup>50</sup>

Usually the council or governing legislative body performs legislative, ministerial, administrative, and sometimes, judicial functions—this, of course, depending

of selecting a site for erecting a township hall thereon was held to be vested in the board of directors and not in the citizens of the township assembled *en masse*. State ex rel. v. Haynes, 72 Mo. 377, 379.

Under the Illinois system of township organization there is no board representing the corporate authorities of the town, but the electors represent themselves as a corporation. Kankakee v. K. & I. R. R. Co., 115 Ill. 88, 90, 3 N. E. 741.

See § 64 *et seq. ante*.

49. Origin of double house in London. By the end of the 13th century London had definitely established two councils, that of the mayor and aldermen, representing the old borough court, and a common council, representing the voice of the commonalty, as expressed through the city wards. In the 14th century this plan was widely favored, perhaps in imita-

tion of the House of Lords and the House of Commons. 4 Encyc. Britannica (14th Ed.), tit. "Borough," pp. 270, 271.

50. § 73 *et seq. ante*.

Comments on city council. Goodnow, Municipal Government, ch. X, p. 165 *et seq.* Fairlie, "American Municipal Councils," Political Science Quarterly, Vol. XIX, p. 237 *et seq.*

The number of councilmen, aldermen, etc., is controlled by the law applicable, its proper construction, etc. Com. v. Omensetter, 9 Phila. (Pa.) 489; Petition of Young, 11 Pa. County Ct. Rep. 209; Com. v. Hastings, 16 Pa. County Ct. Rep. 425; State v. Champlin, 16 R. I. 453, 17 Atl. 52.

*Cincinnati*. Under the New Municipal Code (Oct. 22, 1902) Cincinnati is entitled to twenty-nine members in the city council, twenty-four elected by wards, and five at large. Zumstein v. Mullen, 67 Ohio St. 382, 66 N. E. 140.



on the local laws—and ordinarily exercises a general supervision over the entire municipal government. Thus in many respects, in its powers and duties, it differs from a purely legislative body.<sup>51</sup>

### § 574. Corporate meetings required.

All of the public or corporate affairs of the municipal corporation must be transacted in substantially the manner pointed out by the law. In the representative form these matters must be done at a legal meeting of the council or governing body. Where the inhabitants themselves constitute the corporate authorities, as in the New England town, the municipal affairs must be conducted at a legal corporate meeting of such inhabitants. The funda-

51. *Renter v. Meacham Contr. Co.*, Ky. (1911), 136 S. W. 1028.

**Power of council.** Under a charter which provides that the common council shall have power "to manage, regulate and control the property, real and personal, of the city," the propriety of demolishing and removing or repairing a municipal building is a question exclusively for such control. The fact that the question had been determined otherwise by a majority of the electors of the city upon the submission to them by action of a prior council does not take away the power. *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666.

In England with a few unimportant exceptions, the council dominates the municipal government. 2 Goodnow, *Comparative Administrative Law*, p. 236; Shaw, *Mun. Gov. in Great Britain*, pp. 30, 63, 64; Fairlie, *Municipal Administration*, ch. XVII, p. 375.

See §§ 44, 59, 81, 82 *ante*.

In Germany the powers of the council are not so extensive where an executive authority exists which is an agency of the state for the enforcement of state laws, and which exerts considerable influence over the decisions of the council, not only in the exercise of the veto power, but also in initiating legislation and public work and improvements.

In France and Italy the council is not so important as an organ of municipal government as in England, but "the fact that the executive has no veto power over its action gives it a greater legislative power than has the council in Germany." Goodnow, *Municipal Government*, ch. X, pp. 179 to 181.

In France the council is restricted almost exclusively to legislative functions. Wilcox, *Study of City Gov.*, ch. IV.

See §§ 77, 78 *ante*.

mental principle is that the affairs of a corporate body can be transacted only at a valid corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it, or those who are its duly constituted representatives—the legal corporate authorities—and its purposes or will can be expressed only by acts or votes embodied in some distinct and definite form.<sup>52</sup> The existence of the council or governing body is as a board or entity, and the members thereof can do no valid act except as a board,<sup>53</sup>

52. *Edsall v. Jersey Shore Borough*, 220 Pa. 591, 70 Atl. 429.

**Corporate meetings required.** A municipal corporation in legal contemplation is an entity possessing for many purposes the attributes of individuality; and in the exercise of its legitimate powers can only act by and through its agents appointed in the mode prescribed by the law of its creation. The rights of individual corporators can only be enjoyed by and through the agents constituted by law to exercise the corporate powers. "A contrary doctrine carried to its ultimate consequences would require the affirmative consent of each individual corporator to every act done by the corporate authorities affecting his interest before he could become bound by such act; the result of which would be to render entirely useless and nugatory the corporate government." *People ex rel. v. Coon*, 25 Cal. 635, 649.

53. *United States. Strong v. District of Columbia*, 4 Mackey (15 D. C.) 242, 9 Am. & Eng. Corp. Cas. 568; *Leavenworth County Commissioners v. Sellev*, 99 U. S. 624.

*Arkansas. Little Rock v. Board of Improvements*, 42 Ark. 152.

*California. San Luis Obispo Co. v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888.

*Florida. Com'rs v. King*, 13 Fla. 451.

*Iowa. Independent School District v. Wirtner*, 85 Iowa 387, 52 N. W. 243; *Hull v. Independent District*, 82 Iowa 686, 46 N. W. 1053; *Athearn v. Independent District*, 33 Iowa 105.

*Kentucky. Hardin County v. Louisville, etc. R. R. Co.*, 92 Ky. 412, 7 S. W. 860; *Maddox v. Graham*, 2 Metc. (Ky.) 56.

*Maryland. Baltimore v. Poultney*, 25 Md. 18.

*Massachusetts. Coffin v. Nantucket*, 5 Cush. (59 Mass.) 269; *Central Bridge Co. v. Lowell*, 15 Gray (Mass.) 106; *Reed v. Lancaster*, 152 Mass. 500, 25 N. E. 974; *Butler v. Charlestown*, 7 Gray (Mass.) 12; *Sikes v. Hatfield*, 13 Gray (Mass.) 347.

*Missouri. Pugh v. School Dist.*, 114 Mo. App. 688, 91 S. W. 471; *State v. Haynes*, 72 Mo. 377; *Smith v. Tobener*, 32 Mo. App. 601.

*New Jersey. Schumm v. Seymour*, 24 N. J. Eq. 143, 153; *State*

and such act, if legislative in character, must ordinarily be by ordinance, by-law or resolution, or something equivalent thereto.<sup>54</sup>

### § 575. Kinds of corporate meetings stated—notice.

Corporate meetings may be (1) regular or stated, (2) special or called, and (3) adjourned. Regular meetings are usually prescribed by charter. They are sometimes provided for by ordinance, resolution or motion, under legal authority. Special or called meetings are convened by the mayor or chief executive of the corporation, the presiding officer of the corporate body, or in some other definite way, on due notice to all of the members.<sup>55</sup>

*v. Jersey City*, 35 N. J. L. 404; *State v. Van Buskirk*, 40 N. J. L. 463; *State v. Jersey City*, 25 N. J. L. 309.

*New York*. *Delaware Co. Comrs. v. Sackrider*, 35 N. Y. 154; *People v. Walker*, 23 Barb. (N. Y.) 304; *Johnson v. Dodd*, 56 N. Y. 76; *People v. Superior Court*, 19 Wend. (N. Y.) 68; *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456.

*North Carolina*. *Pegram v. Cleveland County Com'rs*, 64 N. C. 557.

*Ohio*. *McCortle v. Bates*, 29 Ohio St. 419; *Young v. Rushsylvania*, 8 Ohio Cir. Ct. Rep. 75.

*Pennsylvania*. *Rittenhouse's Estate*, 140 Pa. St. 172, 176, 21 Atl. 254; *Commonwealth v. Howard*, 149 Pa. 302, 24 Atl. 308; *Jefferson County v. Slagle*, 66 Pa. St. 202.

*Texas*. *Dennison & P. Sub. R. Co. v. James*, 20 Tex. Civ. App. 258, 49 S. W. 660.

*Wisconsin*. *State v. Madison Council*, 15 Wis. 30, 37; *Deischel v. Maine*, 81 Wis. 553, 51 N. W. 880.

County commissioners can only bind the county for legal services when acting as a board, and not severally. *Cass Co. Comrs. v. Ross*, 46 Ind. 404; *Rankin v. Jauman* (Idaho, 1895), 39 Pac. 1111; *Conger v. Commissioners* (Idaho, 1896), 48 Pac. 1064.

A committee chosen by a town for a particular purpose may act by agreement of the individual members separately obtained. *Shea v. Milford*, 145 Mass. 528, 14 N. E. 764; *Haven v. Lowell*, 5 Metc. (Mass.) 35.

54. *Dey v. Jersey City*, 19 N. J. Eq. 412, 416; *Halsey v. Rapid Transit R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859.

55. A stated meeting is one appointed by the council. A special meeting is called by the mayor or three aldermen. *State v. Jersey City*, 25 N. J. L. 309, 311.

Special meetings. By statute, in Illinois the council may prescribe, by ordinance, the times and places of the meetings, and the manner in which special meet-

A legal notice to all of those composing or representing the corporate body of every meeting is requisite, since it is not only the duty but the right of each member to be present and participate in the deliberations and proceedings. Thus where the law requires that the meeting be duly called and the members notified, omission to do this will invalidate the proceedings where the meeting is not attended by all of the members composing the body. The mere attendance of a quorum under such circumstances does not make a legal meeting, but every member has a right to be present and participate in its action.<sup>56</sup> The notice must be issued and served by the proper authority, giving the time and place of the meeting, unless held at the usual place.

In ancient England the place of meeting was generally fixed, as at the guild hall; in this country, at the town or city hall. Whenever the meeting is held at an unusual

ings may be called. 1 Starr & Curtis Ill. Stat. p. 685, par. 38.

In the absence of proof to the contrary special meetings of the common council will be presumed to have been regularly called and held. *Rome v. Whitestown Waterworks Co.*, 100 N. Y. S. 357, 113 App. Div. 547.

In Wisconsin the statutes prescribe the manner in which special meetings shall be held. Rev. St. 1898, § 890.

56. *Beaver Creek v. Hastings*, 52 Mich. 528, 18 N. W. 250; *State ex rel. v. Guiney*, 26 Minn. 313, 3 N. W. 977; *Peay v. Schenck*, 1 Woolw. C. C. (U. S.) 175, 187; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826.

Mayor and all aldermen being present, meeting held a valid and "called" meeting, though notice was not given. *Ryan v. Tuscaloosa*, 155 Ala. 479, 46 So. 638.

In Idaho it was held that where the business to be transacted did not incur an indebtedness where the mayor and all members of the city council but one were present, they could hold a valid meeting notwithstanding the call was not made in writing as required by law. *Sommercamp v. Kelly*, 8 Idaho 712, 71 Pac. 147.

A special meeting of a city council at which all members were present except two, one of which being absent from the city and at such distance that he could not be notified within the time provided by law and the other being notified personally requested the mayor to excuse him from attending, was held to be a valid meeting, a quorum being present for the transaction of business specified in the call. *Gale v. Moscow*, 15 Idaho 332, 336, 97 Pac. 828.

place, intimation of that circumstance must be contained in the notice, to prevent fraud or surprise.<sup>57</sup> Unless the meeting is convened for a special purpose, its object need not be specified in the notice.<sup>58</sup> When required by law, personal notice must be given where it can be done, but where a member of a board is absent from the state and beyond reach of actual notice, such notice is not necessary, but constructive notice will do.<sup>59</sup>

If the charter or law fixes the time of the regular meetings, of course, notice is not necessary unless expressly required, as each member is charged with knowledge thereof.<sup>60</sup> If the charter makes no provision respecting the manner in which the time for the holding of a stated meeting shall be fixed, the council may, upon mere motion, prescribe such time, notwithstanding the

57. Willcock, Mun. Corp., 51.

Place of meeting. "All acts done at another than the usual place bear the stamp of contrivancy, secrecy and fraud and the court will suspect an improper motive." Glover, Mun. Corp., 152.

"The board shall not adjourn to any other place than to its regular place of meeting, except in case of great necessity or emergency." Charter San Francisco, art. II, ch. 1, § 6; Statutes and Amendments to Codes of Cal. (1899), p. 244.

Place of meeting of trustees in Kentucky. Wells v. Mt. Olivet, 126 Ky. 131, 31 Ky. Law Rep. 576, 11 L. R. A. (N. S.) 1080, 102 S. W. 1182.

Where the place of meeting is provided for by ordinance proceedings had at a meeting will not be held void on the ground that the meeting was not held at the place fixed by the ordinance unless such fact affirmatively appears. Green-

food v. Jones, 91 Miss. 728, 46 So. 161.

Where a council by ordinance fixes its meeting place, meetings held at another place are unauthorized and ordinances passed thereat are void unless urgent reason can be shown therefor. Shugars v. Hamilton, 122 Ky. 606, 29 Ky. Law Rep. 127, 92 S. W. 564.

58. See ch. 16 *post*.

59. Notice. Where the mayor is *ex officio* a member of a board he must be notified of a meeting. State ex rel. Harty v. Kirk, 46 Conn. 395, 398.

As to notice at common law, see Glover, Mun. Corp., 148, 151.

60. People v. Batchelor, 22 N. Y. 128, 146; Hudson County v. State, 24 N. J. L. 718; Rex v. Hill, 4 Barn & Cress. 441, 443; Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.) 201, 208; Willcock, Mun. Corp., 42; Glover, Mun. Corp., 148.

time for holding such meetings had been previously fixed by a formal resolution, approved by the mayor and published.<sup>61</sup> So where the charter provides that the council shall meet at such time and place as it, by resolution, may direct, a meeting held at any other time than that fixed for a regular meeting, under a resolution of the council, is a legal meeting if all of the members actually attend and participate in the proceedings, and it is otherwise regular, there being nothing in the charter expressly or impliedly forbidding such meeting.<sup>62</sup>

In one case the charter prescribed that "stated" meetings should be held once each month. Pursuant thereto, by rule, the council appointed stated times for meetings. Here it was held such appointment continued in force in each succeeding council till duly changed.<sup>63</sup>

61. *State v. Kantler*, 33 Minn. 69, 6 Am. & Eng. Corp. Cas. 169, 21 N. W. 856.

62. **Voluntary meeting.** "The powers conferred, and the duties imposed, upon the common council were obviously with the view of their being exercised whenever occasion required, and no limitation or restriction upon its right voluntarily to meet at any time for such purpose can be inferred from the fact that it is made obligatory upon it to provide by resolution for a regular time and place of meeting, or the fact it may be convened at any time upon call of the mayor." *State ex rel. v. Smith*, 22 Minn. 218, 222, 223.

**Meeting place discretionary, when.** Where the charter provided that the trustees should meet at a place within the corporate limits to be fixed by ordinance, and no such ordinance has been adopted, they may meet at some convenient and accessible

place within the corporate limits of the town. *Wells v. Mt. Olivet*, 126 Ky. 131, 31 Ky. L. Rep. 576, 102 S. W. 1182, 11 L. R. A. (N. S.) 1080.

63. *North v. Cary*, 4 Thomp. & C. (N. Y.) 357.

**Presumption as to validity.** Where a council meeting might have been regularly held, in the absence of proof to the contrary, the court will presume it to have been so held. *People ex rel. v. Rochester*, 5 Lans. (N. Y.) 11, 15.

Acts done by a corporation which presupposes the existence of other acts to make them legally operative, are presumptive proof of the latter. *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, 70, 6 L. Ed. 552; *Nelson v. Eaton*, 26 N. Y. 410, 415.

**First meeting to organize.** Where the charter provides that a majority "shall constitute a quorum to do business," a major-

# § 576. Corporate meetings at common law—corporate and select assembly.

According to the ancient English law there were two kinds of corporate meetings: One consisted of the body at large or those of them who thought proper, or were considered by their fellow freemen most proper, to attend. In legal supposition this was the common council, but in fact the common council became in almost every instance a select body in which the freemen had little or no interest. This was denominated the corporate assembly. The other was the select assembly and was composed of one or more of the governing class and of which the largest became prior to the Municipal Corporation Act of 1835 a sort of common council.<sup>64</sup>

To constitute a corporate assembly at common law there must be present the head officer, a majority of the members of each select class, and some of the commonality, and of each of the other indefinite classes if there should be any. To constitute a select assembly there must be present, according to the common law, a majority of each of the select classes of which it is composed, and, of course, if only one class, then a majority of them all is required.<sup>65</sup>

ity of those elected can organize and act at the first meeting, as well as at any subsequent meeting. *Oakland v. Carpentier*, 13 Cal. 540, 550.

64. *Willcock, Mun. Corp.*, 51, 52, 62, 63; *Glover, Mun. Corp.*, 146, 147; *Rex v. Morris*, 4 East. 26; *Rex v. Bellringer*, 4 Term Rep. 823.

65. **Majority of each definite class.** The law presumes that a corporation will always keep up the number of members which the prescription or charter has assigned to each definite class, and, therefore, a majority of each

definite class means a majority of that number of which by the regulations of the constitution each definite class ought to consist. *Willcock, Mun. Corp.*, 51, 52; *Glover, Mun. Corp.*, 147.

A majority of each definite integral part, that is, a majority of that number of which each of these parts is constituted and of which it ought constantly to consist is meant, and not merely a majority of the surviving or existing members of each class. *Willcock, Mun. Corp.*, 62, 63; *Rex v. Morris*, 4 East. 26; *Rex v. Bellringer*, 4 Term Rep. 810, 823.

As stated in the last section, the place of meeting was generally fixed, as at the Guild Hall, and whenever the meeting is held at an unusual place, intimation of that circumstance must be contained in the notice, to prevent fraud or surprise.<sup>66</sup>

By the early English law not only the nature of the organization of the local corporation under its charter largely determined the validity of its corporate meetings, but prescription and usage were constantly invoked, and the result was much uncertainty, and confusion prior to the reforms wrought by the Municipal Corporations Act of 1835.

Additional rules of the common law respecting the requisites of a valid corporate meeting in-as-far as they have been held applicable to the municipal corporations of this country are mentioned in subsequent sections of this chapter.

### § 577. New England town meetings—notice or warning indispensable.

The rule of law is firmly established that a town may only legally act in its corporate capacity in town meeting duly notified or warned and holden. The notice or warning of the meeting cannot be legally waived even by unanimous consent.<sup>67</sup> Unless the meeting is legally con-

66. § 575 *ante*.

67. *Connecticut*. Congregational Society of Bethany v. Sperry, 10 Conn. 200.

*Maine*. Ford v. Clough, 8 Me. 334, 23 Am. Dec. 513; Lander v. School District, 33 Me. 239; Moor v. Newfield, 4 Me. 44.

*Massachusetts*. Stoughton v. Atherton, 12 Metc. (Mass.) 105; Reynolds v. New Salem, 6 Metc. (Mass.) 340; Perry v. Dover, 12 Pick. (Mass.) 206; Little v. Merrill, 10 Pick. (Mass.) 543; Hayward v. School District, 2 Cush. (Mass.) 419; Stone v. School

Dist., 8 Cush. (Mass.) 592; Rand v. Wilder, 11 Cush. (Mass.) 294.

*New Hampshire*. Giles v. School District, 31 N. H. 304; Northwood v. Barrington, 9 N. H. 369; Brewster v. Hyde, 7 N. H. 206.

*Vermont*. Sherwin v. Bugbee, 17 Vt. 337; Hunt v. School District, 14 Vt. 300; Hunneman v. Fire District, 37 Vt. 40.

*Wisconsin*. Rule applied to town meetings in other states. Tuttle v. Weston, 59 Wis. 151, 17 N. W. 12, 2 Am. & Eng. Corp. Cas. 168.



vened, all votes and acts done thereat are void.<sup>68</sup> As stated by the Supreme Court of Vermont, the votes of a town meeting held on insufficient notice are no more binding upon the town than if the meeting had been held without notice, or had been a mere fortuitous assembling of any portion of the inhabitants of the town.<sup>69</sup> "A town cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified and warned."<sup>70</sup> There cannot be a legal town meeting unless it be originally held at the time and in the place appointed in the warrant calling the meeting, and where a meeting is called at a school house it must be understood to means within its walls.<sup>71</sup> Where the meeting is appointed in the basement of a building, and all of the voters and officers, by unanimous consent, but without a vote, go out into the open air, and in front of the place of the meeting, where they can more conveniently vote on a proposition, and there vote without objection on the part of any person, the action is legal.<sup>72</sup>

Following the rule of the common law applied to indefinite corporate bodies, where the meeting has been duly warned and called, those who attend and participate in its proceedings, notwithstanding they may be less than a majority of all of the inhabitants legally qualified, have full power to act for and bind the town; the absence of the others is equivalent in law to their consent to any legal action.<sup>73</sup>

68. *Haines v. Readfield*, 41 Me. 246; *Jordan v. School District*, 38 Me. 164.

69. *Pratt v. Swanton*, 15 Vt. 147, 151.

70. Per Mr. Justice Gray, in referring to the towns of Connecticut, in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 129, 7 Sup. Ct. 865, 30 L. Ed. 923.

71. *Chamberlain v. Dover*, 13 Me. 466.

72. *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844.

Declaring vote, polling, etc., of town meetings—proceedings. *Kimball v. Lamprey*, 19 N. H. 215.

73. *Commonwealth v. Ipswich*, 2 Pick. (Mass.) 70; *Damon v. Granby*, 2 Pick. (Mass.) 345, 355; *First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Williams v. Lunenburg*, 21 Pick. (Mass.) 75.

### § 578. Sufficiency of notice or warning.

The notice or warning must be issued and served by the proper authority.<sup>74</sup> Thus where the warrant for the meeting is required to be under the hands of the selectmen, or of a majority of them, a meeting held in pursuance of a warrant signed by one selectman only, "by order of the selectmen," is void.<sup>75</sup> So where the law requires that, in order to constitute a legal town meeting for the passing of by-laws, there must have been a notification in writing, signed by the selectmen and set upon the sign post five days before the meeting, specifying such by-laws among the objects of the meeting, all by-laws passed without such previous notification are void.<sup>76</sup> The object of the warrant is to give previous notice to the inhabitants of the subjects to be acted on, and, if this is done substantially, it is sufficient.<sup>77</sup>

The notice or warning is required to be served by posting or otherwise, returned and recorded in the corporate records as served. If it does not appear that the notices were not posted as required by law (as at three public places), usually they will be held sufficient, for, in the absence of evidence to the contrary, the presumption will be indulged that the law in this respect was followed.<sup>78</sup> The return of the warrant that the officer

74. *Giles v. San Bornton*, 31 N. H. 304.

Power given to the body to prescribe the mode of warning its meetings does not enable it to dispense with a warning. *Congregational Society of Bethany v. Sperry*, 10 Conn. 200, 208.

*Mandamus* brought by individuals to require the calling of a special meeting of a borough denied, the court holding that such action should be instituted by and in the

name of the State. *Peck v. Booth*, 42 Conn. 271.

75. *Reynolds v. New Salem*, 6 Metc. (Mass.) 340; *Westminster v. Bernardston*, 8 Mass. 104.

76. *Hayden v. Noyes*, 5 Conn. 391, 395, 396; *Willard v. Killingsworth*, 8 Conn. 247, 254.

77. Per Shaw, C. J., in *Torrey v. Millbury*, 21 Pick. (Mass.) 64, 68; *Jones v. Andover*, 9 Pick. (Mass.) 146.

78. *Stoddard v. Gilmann*, 22 Vt. 568, 572.

has "posted the within warrant according to law" is sufficient, without specifying the manner of posting.<sup>79</sup>

### § 579. What the notice or warning must specify.

The notice or warning must specify the matters to be acted on, in order that the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect and binds neither the town nor the inhabitants.<sup>80</sup> Where a meeting is held for a special purpose, ordinarily it is sufficient if the notice is so expressed that the inhabitants concerned may fairly understand the purpose for which they are to be convened.<sup>81</sup>

79. *Rand v. Wilder*, 11 Cush. (Mass.) 294.

Amendment of return of service allowed. *Northwood v. Barrington*, 9 N. H. 369, 376; *Fossett v. Bearce*, 29 Me. 523.

Record of warning of meeting. *Sherwin v. Bugbee*, 17 Vt. 337.

The return must be sufficient or the meeting will be illegal. *State v. Williams*, 25 Me. 561.

As to sufficiency of notice or warning and record of meeting, see *Brownell v. Palmer*, 22 Conn. 107; *State v. Taff*, 37 Conn. 392; *Isbell v. N. Y. & N. H. R. R.*, 25 Conn. 556; *Society for Savings v. New London*, 29 Conn. 174; *Baldwin v. North Branford*, 32 Conn. 47; *N. H., M. & W. R. R. v. Chatham*, 42 Conn. 465; *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22, 29, 30; *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; *Avery v. Stewart*, 1 Cush. (Mass.) 496.

80. "No one can rely upon a vote as giving him any rights

against the town without proving a sufficient notice or warning of the meeting at which the vote was passed." Per Mr. Justice Gray, in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 130, 7 Sup. Ct. 865, 30 L. Ed. 923.

*Connecticut*. *Willard v. Killingworth*, 8 Conn. 247, 254.

*Maine*. *Moor v. Newfield*, 4 Me. 44; *Cornish v. Pease*, 19 Me. 184; *Lander v. Smithfield*, 33 Me. 239; *Drisko v. Columbia*, 75 Me. 73.

*Massachusetts*. *Stone v. Hamilton*, 8 Cush. (Mass.) 592; *Hayward v. North Bridgewater*, 2 Cush. (Mass.) 419; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Stoughton v. Atherton*, 12 Met. (Mass.) 105; *Rideout v. Dunstable*, 1 Allen (Mass.) 232.

*New Hampshire*. *Brewster v. Hyde*, 7 N. H. 206.

*Vermont*. *Hunt v. Norwich*, 14 Vt. 300; *Schoff v. Bloomfield*, 8 Vt. 472.

81. *South School District v. Blakeslee*, 13 Conn. 227.

Hence, in order to render valid a vote of a town granting money for a particular object it is not necessary that the warrant for the meeting should state specifically that the inhabitants will be called to act on the question of granting money for that purpose, if the subject to be acted on is distinctly stated, and it is one which will be likely to require a grant of money.<sup>82</sup>

**§ 580. Illustrative cases as to specification in notice or warrant.**

A notice is sufficiently definite which states the object of the meeting to be "to see what sum of money the town will vote to raise for the support of schools, of the poor, repairing bridges and highways, for the payment of the just debts of the town, and for other legal purposes."<sup>83</sup>

Under a warrant "to see if the town will make an appropriation towards purchasing a fire engine," the town may pass a vote "to raise and appropriate" a sum for that object.<sup>84</sup> So, under a warrant "to see if the town will determine to build a town house and raise and appropriate money for the same," a vote to build a town house will be valid.<sup>85</sup> So a warrant convening a meeting, to ascertain if the town would vote to pay a number of town notes, which specifies each note and gives the name of the payee, amount and date, is sufficient.<sup>86</sup>

A notice "to see if the town will accept and adopt the report of the committee to alter school districts" is

82. Per Parker, C. J., in *Blackburn v. Walpole*, 9 Pick. (Mass.) 97.

**Business on warning.** In Wisconsin under the general powers conferred by statute, the electors at a town meeting may vote to allow a certain sum in settlement of a claim for the support of a pauper, although no previous notice has been given that such claim will be presented or acted

upon. *Tuttle v. Weston*, 59 Wis. 151, 17 N. W. 12, 2 Am. & Eng. Corp. Cas. 168.

83. *Tucker v. Aiken*, 7 N. H. 113, 125.

84. *Torrey v. Millbury*, 21 Pick. (Mass.) 64, 68.

85. *Hadsell v. Hancock*, 3 Gray (Mass.) 526, 530.

86. *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844.

sufficient to authorize the making of such alteration as the committee recommended and no other. "It would be an unwarranted construction, and in violation of all rules, to sever the last four words, 'to alter school districts' from what precedes in the sentence, and hold that the alteration of school districts in any and every possible way was before the town for action."<sup>87</sup>

But where the annual meeting was warned to choose town officers, "and to do any other business then thought proper by said meeting," a by-law passed at such meeting to regulate the shell fisheries of the town is void, as this purpose was not specified in the warning.<sup>88</sup>

Under an article in a warrant "to choose selectmen, assessors and all other officers that the law requires, or, may be thought necessary," at a legal meeting of the town, a fish committee may be legally chosen.<sup>89</sup> So under a warrant "to choose all such town officers as the law directs," the town may lawfully pass a vote authorizing the several school districts to choose their prudential committees.<sup>90</sup> Article in the warrant "to choose all necessary town officers," is sufficient to authorize the choice of an agent to build a road.<sup>91</sup>

### § 581. Legal governing body—de facto councils and officers.

Unless corporate acts are done by the body of officers legally authorized to act, they will be declared invalid. The offices must be filled, the council or governing body constituted, and the corporate acts performed as prescribed in the law applicable to the corporation.<sup>92</sup> Thus

87. *Wiley v. Wilson*, 44 Vt. 404, 409, per Ross, J.

88. *Hayden v. Noyes*, 5 Conn. 391, 395, 396; *Willard v. Killingsworth*, 8 Conn. 247, 254.

89. *Spear v. Robinson*, 29 Me. 531.

90. *Kingsbury v. Quincy School District*, 12 Met. (Mass.) 99, 104; *Williams v. Lunenburg School District*, 21 Pick. (Mass.) 75.

91. *Baker v. Shephard*, 24 N. H. 208, 212, per Bell, J.

92. *San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682.

a city organized and existing under a special charter cannot elect its officers and constitute its governing body under the provisions of the general incorporation act of the state where the officers are different and are elected at different times than provided in its special charter. As applied to the particular corporation, the offices to which the officers were elected were held not to exist *de jure*, for the reason that there can be no office *de facto* where no officer *de jure* is provided for.<sup>93</sup> But where offices *de jure* exist they may be filled by those whose official titles are defective. Hence, where a majority of the members of a council have been unlawfully elected and the council is thus illegally constituted, it is notwithstanding competent to exercise the functions of a lawful body.<sup>94</sup> So the vote of one ineligible to legally act as a member of the council is nevertheless valid as he is a *de facto* member.<sup>95</sup>

93. *Decorah v. Bullis*, 25 Iowa 12; *Ex parte Snyder*, 64 Mo. 58, 62; *State v. O'Brian*, 68 Mo. 153, 154.

To say that an officer is one *de facto* when the office itself is not created or authorized is a political solecism, having no foundation in reason nor support in law. *Per Dillon, J., Welch v. Ste. Genevieve*, 1 Dillon, C. C. 130, 136.

§ 482 *ante*.

94. Such body may legally elect or appoint city officers. *State ex rel. v. Tolan*, 33 N. J. L. 195.

**De facto councilmen.** *State ex rel. v. Gray*, 23 Neb. 365, 36 N. W. 577; *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 9 L. R. A. 786, 47 N. W. 280; *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

*Renter v. Meacham Const. Co.* (Ky. 1911), 136 S. W. 1028, held

one not a freeholder as law required was a *de facto* member.

**De facto board of chosen freeholders.** *State ex rel. v. Meehan*, 45 N. J. L. 189; *State ex rel. v. Farrier*, 47 N. J. L. 383, 1 Atl. 751.

Acts of members of board of town trustees held illegal where they did not proceed to qualify as prescribed by charter. *Dinwiddie v. Rushville*, 37 Ind. 66.

95. *Susanville v. Long*, 144 Cal. 362, 365, 77 Pac. 987, citing *McQuillin, Mun. Ord.*, § 96.

**De facto member illustrated.** In a New Jersey case an ordinance granting certain franchises to a street railway was passed by the vote of a disqualified member who had become ineligible by reason of appointment to an office in the army. The charter provided that no one of the governing body "shall accept

## § 582. Conflicting councils—injunction.

The Supreme Court of Pennsylvania restrained by injunction a body claiming to be the legally organized council at the instance of another body making a like claim and which proved to have the *prima facie* right to act for the corporation; the court saying that it was not necessary in such proceeding for the attorney general of the state to file the bill or be made a party, and that "it is right for those to whom public functions are entrusted to see that they are not usurped by others. Either of these bodies has the right to demand of the courts that it and the interest of the public, alleged to have been committed to it, shall be protected against usurpation of the others." The question of title between the conflicting bodies was not determined. It appears that the injunction was

or hold any other place of public trust or emolument within the elective franchise, nor any appointment to public office unless he shall first resign his said office, and if he shall so accept, his office shall thereupon become vacant." The validity of the ordinance was questioned on this ground. Here it was held:

(1). That his term not having expired, and no successor having been appointed, and as he, in good faith, continued to perform the duties of his office, he was an officer *de facto*.

(2). That his official acts were valid so far as third persons were concerned.

(3). That upon acceptance of the second office his *de jure* title to the first ends, and his successor may be appointed at once.

(4). That where the former occupant refuses to vacate the office his successor will be compelled to

take the necessary legal steps to oust him.

(5). Where an action is begun the object of which is only to determine the validity of an act or thing done by an officer, and not involving his integrity or want of good faith, the officer himself is not a necessary party to the suit. *Oliver v. Jersey City*, 63 N. J. L. 96, 634, 42 Atl. 782, 44 Atl. 709, 48 L. R. A. 412.

**When council expires.** Charter provided that council shall meet for organization on the first Monday of January at 10 a. m., and that all officers shall hold their respective offices until their successors shall be elected and qualified. Held, old council had no authority to hold a meeting after time named for organization of new council, except to act in case the new members failed to qualify. *Fitzgerald v. Pawtucket St. Ry.*, 24 R. I. 201, 52 Atl. 887.

awarded on the sole ground of public necessity, as the facts appeared to the court.<sup>96</sup> The general rule is that injunction will not lie to determine the title to a public office.<sup>97</sup> This jurisdiction belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, *quo warranto* or information in the nature of a writ of *quo warranto* according to the circumstances of the case and the mode

96. **Conflicting councils—injunction.** The court said (p. 296): "In all bodies that are under law, the law is that where there has been an authorized election for the office in controversy, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law. \* \* \* No doubt, this gives great power to dishonest election officers, but we know no remedy for this but by the choice of honest men. When party fealty is a higher qualification than honesty or competence we must expect fraud and force to rule, and a man must be an Ajax or an Ulysses to be qualified for office.

"On the division of a body that ought to be a unit, the test of which represents the legitimate, social succession is, which of them has maintained the regular forms of organization according to the laws and usages of the body or in the absence of these according to the laws, customs and usages of similar bodies in like cases or in analogy to them. This is the uniform rule in such cases.

\* \* \* The court can never apply it to divisions in the supreme legislature, because that body is subject to no judicial authority, and cannot be. \* \* \*

(P. 297). "In all cases where part of the public body remains and is to be completed by the reception of new members it remains as an organized nucleus and in its organized form it receives the new members and then proceeds to the election of new officers, if any are then to be elected. The old nucleus is not dissolved by (p. 298), the incoming elements, but these are added to it and then the whole body proceeds to the exercise of all its functions. \* \* \* In such matters the race is not to the swift, nor the battle to the strong or loud-voiced, but to the orderly." *Kerr v. Trego*, 47 Pa. St. 292, 296, 297, 298.

See comments of Judge Dillon on this case, 1 Dillon, Mun. Corp. (5th Ed.), p. 840, n. 2 to § 517.

97. *Updegraff v. Crans*, 47 Pa. St. 103; *Attorney General v. Utica Ins. Co.*, 2 Johns Ch. (N. Y.) 371; *Demarest v. Wickham*, 63 N. Y. 320.

See §§ 469, 470 *ante*.



of procedure established by the common law or by local statute.<sup>98</sup>

### § 583. Presiding officer at common law—under Municipal Corporation Act.

In England prior to the Municipal Corporation Act of 1835, the right of the mayor to preside depended upon the particular charter, usages and customs.<sup>99</sup>

98. Injunction to try title to office. "No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. In the courts of the several states such a power in a court of equity has been denied in many well-considered cases." In re Sawyer, 124 U. S. 200, 212, 8 Sup. Ct. 482, 31 L. Ed. 402, per Gray, J.

Equity has no jurisdiction to adjudicate the right to an office. State ex rel. v. Aloe, 152 Mo. 466, 54 S. W. 494.

The right to preside cannot be determined by injunction. Cochran v. McCleary, 22 Iowa 75, 86. But held that where one undertakes to preside, without color of right, to subserve public interests, injunction may prevent. Carline v. Shellenberger, 13 Pa. Co. Ct. Rep. 145, 23 Pittsb. Leg. J. 386.

Injunction to restrain *de facto* mayor and aldermen from acting as such. Campbell v. Wolfender, 74 N. C. 103.

Right of incumbent of an office cannot be tried in a collateral action between third persons. Facey v. Fuller, 13 Mich. 527.

Special statutory provision.

State ex inf. v. Bland, 144 Mo. 534, 46 S. W. 440.

Where the incumbent of an office holds it by color of right, though he is not an officer *de jure*, his right will not be inquired into on *habeas corpus*. *Ex parte Strahl*, 16 Iowa 369.

*Quo warranto* will lie to prevent officers illegally appointed or elected from performing the duties of the office. Updegraff v. Crans, 47 Pa. St. 103; People ex rel. v. Utica Ins. Co., 15 John (N. Y.) 358; Rex v. Williams, 1 Burr. 402; Rex v. Hartford, 1 Ld. Raym. 426; Mozley v. Alston, 1 Phill. 790; Lord v. Governor, etc., 2 Phill. 739; Willcock, Mun. Corp., 456, par. 337.

Councilmen superseded by others elected under void proceedings may be restored by due process of law, by action of *quo warranto* brought by *de jure* councilmen against *de facto* councilmen. State ex rel. v. Gray, 23 Neb. 365, 370, 36 N. W. 577; Demarest v. Wickham, 63 N. Y. 320.

See §§ 469, 470 *ante*.

99. Per Dillon, J., in Cochran v. McCleary, 22 Iowa 75, 81, 83; *Ex parte Mayor of Birmingham*, 3 Ellis & E. 222.

At common law the legal head officer, although not required by the charter, must be present or the corporate assembly is incomplete. The head officer must preside, to validate the corporate acts, and such officer must be the legal officer, that is, the officer *de jure*. Acts done at a meeting presided over by a *de facto* head officer who is subsequently ousted on a writ of *quo warranto* will be held void. "This is a common law privilege attached to his office, that no corporate acts done in his absence is valid."<sup>1</sup>

To convene and elect a principal officer in the absence of the mayor or head officer, and without his permission, is an offense indictable at common law. The court of the King's Bench will not only compel a mayor to convene the corporation at any time when a sufficient cause is shown, by issuing the writ of *mandamus*, but will chastise him when his abuse of office tends to the hindrance of the administration of justice in the municipality, or is otherwise detrimental to the public interest, by allowing a criminal information to be filed against him.<sup>2</sup>

According to the doctrine of the ancient law, the presence of the mayor is not necessary at a select assembly, whether composed of one or more classes to whom a particular kind of business is delegated, unless it is expressly required.<sup>3</sup>

Under the English Municipal Corporation Act, 1882, at every meeting of the council, the mayor, if present, shall be chairman. If the mayor is absent, then the deputy

1. Willcock, Mun. Corp. 53, 54, 55; Glover, Mun. Corp. 153, 154, 155; Rex v. Carter, Cowp. 59; Rex v. Smart, 4 Bur. 2243; Rex v. Ipswich, 2 Ld. Raym. 1237; Rex v. Thornton, 4 East. 308; Rex v. York, 5 Term Rep. 72; Rex v. Dawes, 4 Bur. 2279; Rex v. Hebdon, Andr. 391.

2. Willcock, Mun. Corp. 53, 54; Glover on Mun. Corp. 153, 154; Rex v. Atkyns, 3 Mod. 23; Rex v. Trew, 2 Barnard 370.

3. Willcock, Mun. Corp. 59; Rex v. Corry, 5 East. 379, 380; Rex v. Varlow Cowp. 250; Rex v. Monday, Cowp. 539; Rex v. Bellingr, 4 Term Rep. 822; Rex v. Bower, 1 Barn. & C. 498.

mayor, if chosen for that purpose by the members of the council then present, shall be chairman. If both the mayor and the deputy mayor are absent, or the deputy, being present, is not chosen, then such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then present choose, shall be chairman.<sup>4</sup>

**§ 584. Presiding officer in this country—mayor as member.**

Municipal charters in this country, as formerly in England, do not always agree in the constituents of the council or governing body. Whether the mayor shall be the presiding officer, or shall be regarded as a member, depends upon the proper construction of the charter, or the law under which the corporation is organized.<sup>5</sup>

Frequently the mayor or chief executive officer of the corporation is made the presiding officer of the council or governing body, and oftentimes he is a member of it,<sup>6</sup> and when such member he is to be regarded as a

4. 45 and 46 Vict. c. 50, Second Schedule, meetings and proceedings of the council; also 45 and 46 Vict. c. 50, § 16.

5. *Cochran v. McCleary*, 22 Iowa 75, where the observation is made by Dillon, J., that, "if it had been true that, in England mayors had, in virtue of their office a prescriptive or uniform right to preside at corporate meetings, it would not follow that they would necessarily have that right in this country." *Mills v. Gleason*, 11 Wis. 470.

6. *Hecht v. Coale*, 93 Md. 692, 49 Atl. 660; *State v. Mott*, 111 Wis. 19, 86 N. W. 569; *Woodruff v. Stewart*, 63 Ala. 206.

**Mayor as a member of council—presiding officer.** In Illinois the mayor is the presiding officer.

1 Starr & Curtis Ill. Stat., p. 681, § 20.

In San Francisco the mayor is the presiding officer of the board of supervisors. In his absence the board appoints a presiding officer *pro tempore* from its own members, who has the same right to vote as other members. Charter of San Francisco, art. II, ch. 1, § 5; Statutes and Amend. to Codes of Cal. (1899), p. 244.

The mayor is not a member in the sense in which an alderman is. *Garside v. Cohoes*, 34 N. Y. St. 234, 12 N. Y. S. 192, 195; *People v. Mount*, 186 Ill. 560, 573, 58 N. E. 360; *Winter v. Thristlewood*, 101 Ill. 450, 452; *Carrollton v. Clark*, 21 Ill. App. 74; *Price v. Beale*, 5 Pa. County Ct. Rep. 491;

member for all purposes, though only voting in event of a tie.<sup>7</sup>

Under a charter providing "that the mayor, recorder and aldermen when assembled together and organized shall constitute the common council," etc., the mayor is thus made a member of the council.<sup>7a</sup>

In one case the charter recited that "the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other," and also required "a concurrence of a majority of the whole number of members elected to the council, to pass any by-law, ordinance," etc. Here it was held that an ordinance required the concurrent vote of a majority of all of the councilmen elected. Thus where the council consists of four members and two vote yea and two fail to vote, and the mayor votes yea, this is not sufficient, the court saying that "the vote of the mayor added nothing to the significance of the proceeding."<sup>7b</sup>

Darrach v. Kenney, 12 Pa. County Ct. Rep. 391; Com. v. Kemp Smith, 13 Pa. County Ct. Rep. 667; Zane v. Rosenberry, 153 Pa. St. 38, 25 Atl. 1086, 32 Wkly. Notes Cases 73, 12 Pa. County Ct. Rep. 382.

"In some cases there is a separate council which is only one of the parts of the legislature, and requiring the approval of another board, or of the mayor, acting separately, as the governor does, to complete their action. But most of our cities in their earlier stages, if not permanently, have had a council where the mayor sits in person and over whose action he has no veto. And in all such cases he has been deemed a member as clearly as the aldermen." Per Campbell, C. J., in People ex rel. v. Harshaw, 60 Mich. 200, 202, 1 Am. St. Rep. 498, 26 N. W. 879.

The minutes need not affirmatively recite the mayor's presence at the council meeting. Aurora Water Co. v. Aurora, 129 Mo. 540, 578, 31 S. W. 946.

7. Griffin v. Messenger, 114 Iowa 99, 86 N. W. 219; People v. Batchelor, 22 N. Y. 128.

7a. People ex rel. v. Harshaw, 60 Mich. 200, 1 Am. St. Rep. 498, 26 N. W. 879.

Intendant. Under a charter provision "that the intendant of police shall have a seat in the board of commissioners, and when present shall preside therein; in his absence the board shall appoint a chairman *pro tempore*," held that the intendant is thus constituted a member. Raleigh v. Sorrell, 1 Jones (46 N. C.) 49.

7b. State ex rel. v. Gray, 23 Neb. 365, 369, 36 N. W. 577.

Under substantially the same charter provisions a contrary conclusion has been reached.<sup>7c</sup>

The fact that the mayor is required to approve certain ordinances before they take effect does not make him a member of the governing body.<sup>8</sup>

In some instances the council or governing body elects its own presiding officer.<sup>9</sup> In the absence of express provision a majority vote of a legal quorum will be sufficient to elect.<sup>10</sup> Where the body has the power to choose its own presiding officer from its own members, the office is held at the will and authority of a majority of the members, and hence the body has the inherent power to remove such officer at any time, unless prohibited by some express constitutional or statutory provision.<sup>11</sup>

The presiding officer is not entitled to vote by virtue of his office, but of course if he is a member of the body he may vote as such member. He may also vote the

7c. Mayor as member illustrated. The charter provisions were: "The mayor shall preside at all meetings of the city council but shall not vote except in case of a tie, when he shall give the casting vote." "The concurrence of a majority of all the members in the city council shall be necessary to the passage of any ordinance." Here it was held that the mayor is constituted a member of the council, and as such is entitled to vote in case of a tie on the question of the passage of an ordinance. *Carrollton v. Clark*, 21 Ill. App. 74.

8. *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630.

9. *Cochran v. McCleary*, 22 Iowa 75, 81; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *Commonwealth v. Kepner*, 10 Phila. (Pa.) 510.

Where a board of aldermen had power to elect its own presiding

officer and the power of removal is vested in the mayor and aldermen, an act removing a police officer by the board is not invalid because the mayor did not preside. *Lowrey v. Central Falls*, 23 R. I. 354, 50 Atl. 639.

Election and term of presiding officer under particular provisions. *People v. Strack*, 1 Hun (N. Y.) 96, 3 Thomp. & C. 165; *Armatage v. Fisher*, 74 Hun (N. Y.) 167; *Com. v. Angle*, 14 Pa. County Ct. Rep. 538.

10. *State ex rel. v. Farr*, 47 N. J. L. 208.

11. *State ex rel. v. Alt*, 26 Mo. App. 673, 675, 676; *State ex rel. v. Kiichli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779, citing *Cushing's Law and Practice of Legislative Assemblies*, §§ 294-299, and *In re Speakership of the House of Representatives*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241.

second time in case of a tie if the charter confers this privilege.<sup>12</sup>

The ordinary powers of a corporation do not vest until the body is organized by the selection of a presiding officer. But acquiescence of the members in the presidency of one who has color of right—a *de facto* officer—is tantamount to electing him *pro hac vice*, and so the actual organization is complete.<sup>13</sup>

12. *Colorado*. People v. Wright, 30 Colo. 439, 71 Pac. 365.

*Illinois*. Launtz v. People, 113 Ill. 137, 55. Am Rep. 405; Carrollton v. Clark, 21 Ill. App. 74.

*Kentucky*. Hildreth v. McIntyre, 1 J. J. Marsh. (Ky.) 206.

*Kansas*. Carroll v. Wall, 35 Kan. 36, 10 Pac. 1.

*Michigan*. Carleton v. People, 10 Mich. 250.

*New York*. People v. White, 24 Wend. (N. Y.) 520.

*England*. Rex v. Westwood, 4 Barn. & Cress. 799; Parry v. Berry, Comyns 269; Rex v. Croke, Cowp. 26; Green v. Durham, 1 Burr. 133; Rex v. Head, 4 Burr. 2513.

A member of a board of trustees does not lose his right to vote when elected mayor *pro tem*. Harris v. People, 18 Colo. App. 160, 70 Pac. 699.

Where under the statute a member of the council may be chosen to preside in the absence of the mayor, his selection does not deprive him of his vote, but he cannot also vote as mayor. Shugars v. Hamilton, 122 Ky. 606, 29 Ky. L. Rep. 127, 92 S. W. 564.

13. Dugan v. Farier, 47 N. J. L. 383, 385, 1 Atl. 751.

**Absence of mayor when presiding officer.** Where a city charter provided that the mayor should be *ex officio* a member of the board of railroad commissioners and preside at its meetings when present, but should have no vote unless there be a tie, it was held that it was necessary to the legality of a meeting of the board that the mayor should be notified of the meeting, and therefore, that an officer appointed by the board at a meeting of which the mayor was not notified was not legally appointed, although there was a majority of the votes of the members in his favor, making a case in which the mayor would have no vote. State ex rel. v. Kirk, 46 Conn. 395.

One not a member of a board cannot preside and declare the vote. State ex rel. v. Kirk, 46 Conn. 395.

President is "absent" when he vacates his seat, and refuses to act, and a president *pro tempore* may be chosen to preside, though the regular president remains in the room. Keith v. Covington, 22 Ky. L. Rep. 1414, 60 S. W. 709.

### § 585. Right to preside is franchise.

The right to preside over corporation meetings is to be regarded as a franchise which may be tested by information in the nature of a *quo warranto*.<sup>14</sup> The right cannot be determined on an original bill for injunction.<sup>15</sup>

### § 586. Duties of presiding officer.

It is always the duty of the presiding officer to enforce the law or rules applicable to the body, keep order,<sup>16</sup> and follow the course of the proceedings. Where no clerk or secretary is provided he may appoint one to keep the minutes of the proceedings.<sup>17</sup>

The presiding officer cannot arbitrarily adjourn the meeting,<sup>18</sup> nor declare an officer elected where he does not receive the vote required by law.<sup>19</sup> The presiding officer must announce the vote according to the fact. His declaration respecting a vote on an ordinance or resolution does not involve the exercise of judgment and discretion, is not judicial in character, amounting to an

14. *Reynold's v. Baldwin*, 1 La. Ann. 162; *Cochran v. McCleary*, 22 Iowa 75; *Commonwealth v. Arrison*, 15 Serg. & Ral. (Pa.) 130, 16 Am. Dec. 531; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *Rex v. Williams*, 1 Burr. 402; *Willcock, Mun. Corp.* 456.

15. *Cochran v. McCleary*, 22 Iowa 75, 86.

**Injunction.** Where one undertakes to preside without color of right to do so equity will prevent by injunction to subserve public interests. *Carline v. Shallenberger*, 13 Pa. County Ct. Rep. 145, 23 Pittsburgh Leg. J. 386.

16. For the preservation of order at the meetings the presiding officer may make a parol order for the removal of any disorderly person who disturbs the business of the meeting; an order in writing is not necessary for this purpose. *Parsons v. Brainard*, 17 Wend. (N. Y.) 522.

17. *State ex rel. v. McKee*, 20 Oregon 120, 25 Pac. 292; *State ex rel. v. Smith* (Oregon, 1890), 25 Pac. 389.

18. *Dingwall v. Detroit*, 82 Mich. 568.

19. *State ex rel. v. Fagan*, 42 Conn. 32.

adjudication, and therefore may be collaterally attacked.<sup>20</sup>

If a ruling that a motion to adjourn the council is immediately doubted and questioned, the presiding officer should require the members to stand and be counted to ascertain the vote, and he does not relieve himself of the duty by leaving the chair when the doubt is expressed. In such case a temporary president may be chosen to decide the doubt. The council then should proceed to resolve the doubt by ascertaining the affirmative and negative vote, and if it fails to do so, but, after choosing a temporary president, proceeds to transact other business its action has the effect of deciding the motion not carried.<sup>21</sup>

### § 587. Signing of bills by presiding officer.

Some charters provide that before a bill shall become an ordinance it shall be signed by the presiding officer of the council, or, where the legislative department consists of two branches, by the presiding officer of each house. Before the signature is affixed, the bill is read at length, and if no objections are made the presiding officer in the presence of the house in open session signs it and the fact is noted in the record.<sup>22</sup> Substantially the same provision exists in the constitutions of most of the states. The mere signature of the presiding officer must not be confounded with the approval of the legis-

20. **Announcement of vote.** "The erroneous and arbitrary announcement of the mayor cannot have the effect to nullify the act of a majority of the council." *Chariton v. Holliday*, 60 Iowa 391, 394, 14 N. W. 775.

The vote on the resolution was a tie, and the mayor assumed to cast a deciding vote and declared it carried. By charter mandate such resolution could only be car-

ried by a two-thirds vote. Held, that it was the duty of the mayor to declare it lost. But *mandamus* was denied as no injury could arise to the city, for the resolution was void. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577.

21. *Pevey v. Aylward*, 205 Mass. 102, 91 N. E. 315.

22. Charter St. Louis, Mo., art. III, § 22; *The Municipal Code of St. Louis* (1901), p. 207.



lation on the part of the mayor which is frequently required. This subject is considered in a subsequent chapter.<sup>23</sup>

An entry that the presiding officer signed the bill in open session is sufficient.<sup>24</sup> If no objections are noted in the journal, the presumption will be indulged that all provisions were observed.<sup>25</sup>

Where a bill has passed the body in accordance with charter provisions, the presiding officer must sign it, if no objections are made and sustained in the mode specified in the charter. The mere physical act of signing is simply ministerial and not an exercise of legislative discretion, and *mandamus* will lie to compel its performance. To hold otherwise would be practically to invest the presiding officer with a power of veto upon the legislation of the council, not granted in the charter, or, in effect, reduce the membership of the body to one, namely, the presiding officer.<sup>26</sup>

### § 588. When mayor's approval of proceedings necessary.

The ancient common law doctrine that the head officer or mayor is an integral part of the corporation, and

23. Ch. 16 *post*.

24. Heman Construction Co. v. Loevy, 64 Mo. App. 430.

25. Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 26, 13 S. W. 98; State ex rel. v. Mead, 71 Mo. 266; State ex rel. v. Mason, 155 Mo. 486, 55 S. W. 636.

26. State ex rel. v. Meier, 143 Mo. 439, 447, 448, 45 S. W. 306, affirming 72 Mo. App. 618.

Although this case appears entirely sound it is criticised in a later decision by the same court and perhaps overruled. Albright v. Fisher, 164 Mo. 56, 64 S. W. 106, with two judges dissenting.

Compare *Ex parte* Echols, 39 Ala. 698; State ex rel. v. Stone,

120 Mo. 428, 25 S. W. 376; State ex rel. v. Bolt, 151 Mo. 362, 52 S. W. 262.

Where a reeve of a township (Canada) refuses to sign, and put the seal on a by-law duly passed at a council meeting at which he is presiding he may be directed to leave the chair, and the deputy-reeve may be directed to preside and sign and seal the by-law. Preston and Manvers, 21 U. C. Q. B. 626.

Ordinance held valid although not signed by the presiding officer as required by charter. Saleno v. Neosho, 127 Mo. 627, 48 Am. St. 653, 27 L. R. A. 769, 30 S. W. 190.

hence all corporate acts done in his absence, unless otherwise provided in the charter, are invalid, has never been applied to the office of mayor in this country.<sup>27</sup> Here the powers and duties of the mayor depend almost entirely upon the proper construction of the charter, and the ordinances or by-laws and municipal regulations passed in pursuance of such authority. As pointed out by the Supreme Court of Indiana, properly and primarily the powers and duties of the mayor are executive and administrative and not judicial or legislative; but other powers may be, and often are, conferred upon him.<sup>28</sup>

Whether the mayor's signature is essential to the validity of the proceedings depends upon the charter, but unless it is made essential it has generally been held merely directory. Charter provisions requiring ordinances to be recorded and the records signed by the presiding officer, mayor, recorder or clerk are generally held directory. This is regarded as a mere ministerial duty, and hence its omission will not invalidate the proceedings.<sup>29</sup>

### § 589. Mayor's approval must be in writing.

The approval of the mayor must be in writing. It will not do to leave the validity to depend upon the uncer-

27. 1 Dillon, Mun. Corp. (5th Ed.), § 512; Welch v. Ste. Genevieve, 1 Dillon C. C. 130.

28. Martindale v. Palmer, 52 Ind. 411.

§ 433 *ante*.

29. Stevenson v. Bay City, 26 Mich. 44; Conboy v. Iowa City, 2 Iowa 90; Blanchard v. Bissell, 11 Ohio St. 96, 103; Opelousas v. Andrus, 37 La. Ann. 699.

Minutes of council need not be signed by the clerk who records them unless so required by charter. State ex rel. v. Badger, 90 Mo. App. 183, 188; Brophy v. Hyatt, 10 Colo. 223, 15 Pac. 399.

Where the charter provides that "all by-laws and ordinances shall within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk," and the mayor is the presiding officer, the signature of the mayor is not essential to the validity of an ordinance properly passed by the corporation, however necessary it may be to the authentication of an ordinance in its book of records. Martindale v. Palmer, 52 Ind. 411, 414.

tainty of parol evidence.<sup>30</sup> The Connecticut court held void the practice of treating votes of the council as approved unless disapproved. In this case the mayor testified that he was in favor of the resolution in question and would have approved it in writing had he deemed it necessary, but this was held immaterial, the court observing that the word "approved" means more than expressed mental acquiescence of the mayor in the propriety of what has been done; "it means that the officer in his official capacity as the guardian of the interest of the community, having in view its welfare, and not his personal wish or advantage, shall consider the proposed legislation and determine that it is proper, and make that fact known to all men with absolute certainty, by some visible, unmistakable and enduring mark, to-wit, by written declaration attested by his signature. It is not enough that in the future when the question is made, Is such an act of \* \* \* the common council binding upon the \* \* \* municipality, that it should depend for decision on the memory and testimony of an officer as to what was his unexpressed thought, at a former time, concerning it. Such uncertainty would be unendurable, and therefore we must assume it to be outside of the meaning of any constitution or law."<sup>31</sup>

### § 590. Casting vote by presiding officer.

Where the presiding officer or mayor is a member of the council or governing body, unless expressly forbidden by law, it is generally held that he may not only vote on all questions as a constituent member, but where the

30. "Most mischievous results might follow from the adoption of a contrary rule; large powers are entrusted to these municipal corporations, powers liable to abuse, and often greatly abused, and stringent rules should be applied to their proceedings." *State v.*

*Newark*, 25 N. J. L. 399, 408; *In re Standiford*, 5 Mackey (16 D. C.) 549.

31. *Per Pardee, J., in New York & N. E. R. Co. v. Waterbury*, 55 Conn. 19, 23, 24, 10 Atl. 162.

charter gives him a casting vote in event of a tie he may vote the second time.<sup>32</sup>

The vice-president of the United States, not being a member of the senate, as presiding officer of the senate has no vote unless the vote be equally divided.<sup>33</sup> The same rule generally applies to the lieutenant governors of the various states who are the presiding officers of the several state senates. But the speaker of the national house of representatives, and also the speakers of the houses of representatives of the several state legislatures,

32. *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184, 30 Am. & Eng. Corp. Cas. 453, n.

**Casting vote.** A statute relating to religious corporations required the rector to preside at every meeting of the board of trustees, "and have the casting vote." Held that the term "casting vote" is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. Under the law the chairman was made a member of the body corporate. The statute "first vests the power of election in a body of which the chairman is a constituent member of a right to vote. It then contains another grant of power to the presiding officer, *virtute officii*, in the words, 'he shall have the casting vote.' What is the legal effect of the latter grant? By the common law, a casting vote sometimes signifies the single vote of a person who never votes; but in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then upon an equality, creates a majority by giving a second vote. 1 Bl. Com.

181, n., 478, n." *People ex rel. v. Rector, etc.*, 48 Barb. (N. Y.) 603, 606.

Where the mayor is not a member he cannot vote to make a tie, and then give the casting vote. *Bousquet v. State*, 78 Miss. 478, 29 So. 399.

The president of the council was held not to be a member and his vote could not be counted in determining whether or not there was a majority vote. *Merriam v. Chicago, etc. R. Co.*, 130 Mo. App. 247, 111 S. W. 876.

Mayor not precluded from giving casting vote on the ground of alleged interest. *Smedley v. Kirby*, 120 Mich. 253, 79 N. W. 187, 6 Det. Leg. N. 118, relying on *Taylor v. Normal Highway Commissioners*, 88 Ill. 527.

A councilman chosen to preside in the absence of the mayor, does not on that account lose his right to vote on all propositions because the mayor is only entitled to a casting vote upon a tie. *Michael v. State*, 163 Ala. 425, 50 So. 929.

33. U. S. Constitution, art. 1, § 3.

have a vote as a member of the body over which they preside, and also, where the law so provides, a second or casting vote in event of equal division.

The mayor gives the casting vote, where he is empowered so to do, only in event of a tie vote.<sup>34</sup> Thus, for example, in the election of officers the casting vote may be given only where there is an equal division of votes between the candidates.<sup>35</sup> It cannot be given to make a majority in favor of one candidate when the other votes are scattered among other candidates.<sup>36</sup> Hence, where three vote yea, two do not vote and one votes for another, the latter three being recorded as voting no, and the mayor declares a tie, and casts his vote with the three yea votes, there is no election.<sup>37</sup> But where there are four votes for and four votes against, the mayor may give the casting vote.<sup>38</sup>

Here, as in other proceedings of the council or legislative body, the casting vote must be given in such a way as to indicate clearly the intention of the presiding officer. Where no mandatory charter provision prescribing the form in which it shall be cast exists, any form clearly indicating the will of the mayor will suffice. Thus where the votes are equally divided, a declaration by the presiding officer that a motion or resolution carried has been

34. Mayor to cast vote in event of tie. *Wooster v. Mullins*, 64 Conn. 340, 30 Atl. 144, 25 L. R. A. 694; *Gostin v. Brooks*, 89 Ga. 244, 15 S. E. 361; *Carrollton v. Clark*, 21 Ill. App. 74.

Mayor can only vote in case of tie. *Reynolds v. Baldwin*, 1 La. Ann. 162; *Brown v. Foster*, 88 Me. 49, 33 Atl. 662, 31 L. R. A. 116; *Lake Shore & M. S. R. Co. v. Dunkirk*, 65 Hun (N. Y.) 494, affirmed 143 N. Y. 660, 39 N. E. 21.

When president of council can-

not vote even in case of tie, see *People v. Bresler*, 171 N. Y. 302, 63 N. E. 1093.

35. *Rich v. McLaurin*, 83 Miss. 95, 35 So. 337.

36. *State v. Mott*, 111 Wis. 19, 86 N. W. 569.

37. *State ex rel. v. Alexander*, 107 Iowa 177, 77 N. W. 841.

38. *McCourt v. Beam*, 42 Ore. 41, 69 Pac. 990.

Casting vote in deciding election. *State ex rel. v. Kramer*, 150 Mo. 89, 51 S. W. 716, 47 L. R. A. 551.

held to be a casting vote.<sup>39</sup> Likewise if the presiding officer declares the motion or resolution as lost he will be deemed to have given the casting vote.<sup>40</sup>

### § 591. Casting vote of mayor to confirm his own appointees.

Many charters provide for the appointment or nomination of certain chief executive and administrative officers by the mayor, subject to the confirmation of a majority of the members of the council, or with the consent, or with the advice and consent of the council.<sup>41</sup>

Whether the mayor is authorized to vote for the confirmation of his own appointees where he has a casting vote in event of a tie depends on the proper construction of the laws governing the corporation. It has been held that he may exercise this power.<sup>42</sup> Thus where the charter provides that "in case of a tie vote \* \* \* upon any question whatever, the mayor shall have the right to vote and shall decide the question in dispute," in event of a tie the mayor may vote to confirm his own appointee.<sup>43</sup> So where under the organic law of the corporation the mayor is a constituent part of the council and has the casting vote in case of a tie *in any vote or proceeding* he may vote to confirm his own appointee. Here the council was composed of the mayor and eight aldermen. All were present. Upon roll call for confirmation four voted for, and the others did not vote. The

39. *Launtz v. People*, 113 Ill. 137; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315, 23 N. E. 72, 16 Am. St. Rep. 388; *Small v. Orne*, 79 Me. 78, 81, 8 Atl. 152. S. P. State v. Armstrong, 54 Minn. 457, 56 N. W. 97.

When not, see *Hornung v. State*, 116 Ind. 458, 19 N. E. 151; *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 370, 6 L. R. A. 308.

40. *People ex rel. v. Rector*, etc., 48 Barb. (N. Y.) 603, 607.

41. § 466 *ante*.

42. *State ex rel. v. Pinkerman*, 63 Conn. 176, 191, 28 Atl. 110, 23 L. R. A. 653.

*Contra. State ex rel. v. Whitehead*, 67 N. J. L. 405, 51 Atl. 472.

43. *Hecht v. Coal*, 93 Md. 692, 49 Atl. 660.

mayor then voted to confirm. This action was held valid.<sup>44</sup>

In a Kansas case the mayor possessed power to appoint the officer "by and with the consent of the council." The charter recited that "the mayor shall preside at all meetings of the city council and shall have a casting vote when the council is equally divided, and none other." On the vote to confirm the council was equally divided and the mayor gave the casting vote which was sustained; the court holding that as there were no restrictive provisions in the charter the right of the mayor to vote "extends to a vote upon every question where the council is equally divided."<sup>45</sup>

#### QUORUM AND MAJORITY.

#### § 592. Quorum and majority—quorum defined.

The quorum of a body may be defined to be that number of the body which when legally assembled in their proper place will enable them to transact their proper business, or, in other words, that number that makes a lawful body and gives them power to pass a law or ordinance or do any other valid corporate act.<sup>46</sup>

44. *State ex rel. v. Yates*, 19 Mont. 239, 37 L. R. A. 205, 47 Pac. 1004.

45. *Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1; *Horton, C. J.*, dissents as follows (page 39): "I do not think it good policy for the mayor to be permitted to give the casting vote upon the confirmation of his own nominations to the city council; and unless the language of the statute imperatively demands such a construction, the mayor should have no vote in the confirmation of his appointments. I think the words that 'the mayor shall appoint by

and with the consent of the council,' should be construed to mean that while the mayor may appoint, the council alone shall confirm, and that it was not the intention of the legislature to permit the mayor to control or participate in the confirmation by giving him the casting vote."

46. *Heiskell v. Baltimore*, 65 Md. 125, 149, 4 Atl. 116.

A quorum is such a number of members of a body as is competent to transact business in the absence of the other members. *State v. Wilkesville Tp.*, 20 Ohio St. 233.

### § 593. Quorum and majority at common law.

At common law, in corporations consisting of an indefinite number, a major part of those who are existing at the time, when legally convened, are competent to act for the corporation. This rule is applicable to New England towns.<sup>47</sup> But when the body is definite there must be a major part of the whole number of members composing it, and not merely a major part of its existing members. When such body is legally assembled a majority thereof may do valid acts for the corporation.<sup>48</sup>

A word used to denote a certain number of persons whose presence is requisite at meetings of public or private bodies for the transaction of business. Burrill's Law Dict., tit. "Quorum;" Century Dict. & Cyc., tit. "Quorum."

Charter specified that a quorum should be composed of the majority of the members of the council; held that, a less number than a quorum cannot convene a session of the council and transact business. Benwood v. Wheeling, 53 W. Va. 465, 44 S. E. 271.

Quorum of *de facto* members, held sufficient in one case. Pence v. Frankfort, 101 Ky. 534, 19 Ky. L. Rep. 721, 41 S. W. 1011, distinguishing Louisville v. Higdon, 2 Metc. (Ky.) 526.

Question of quorum in the annexation of contiguous property. Lewis v. Brandenburg, 20 Ky. L. Rep. 1015, 48 S. W. 978, 20 Ky. L. Rep. 1011, 47 S. W. 862.

Origin. The term arose from the Latin words, *quorum aliquem vestrum* \* \* \* *unum esse volumus* (of whom we wish some one of you to be one), which were used in the commission formerly issued to justices of the peace in

England, by which commission it was directed that no business of certain kinds should be done without the presence of one or more of certain justices specially designated. 1 Bl. Com. 351; Burrill's Law Dictionary, title "Quorum;" Century Dict. & Cyc., tit. "Quorum."

47. Damon v. Granby, 2 Pick. (Mass.) 345, 355; Com. v. Ipswich, 2 Pick. (Mass.) 70; Williams v. Luenburg, 21 Pick. (Mass.) 75; First Parish v. Stearns, 21 Pick. (Mass.) 148.

48. *England.* Rex v. Varlow, Cowp. 250; Rex v. Monday, Cowp. 530; Rex v. Bellringer, 4 Term Rep. 822; Gosling v. Veley, 7 Q. B. 406; New Haven Local Board v. School Board, 30 Ch. Div. 350; Rex v. Gaborian, 11 East. 87, n.; Cotton v. Davis, 1 Strange 53; Cortis v. Kent Waterworks, 7 Barn. & C. 314; Blackerr v. Blizzard, 9 Barn. & C. 851; King v. Miller, 6 Durnf. & East (6 Term Rep.) 268, 278; Rex v. Bower, 1 Barn. & Cress. 492; King v. Greet, 8 Barn. & Cress. 363; Rex v. Devonshire, 1 Barn. & Cress. 609; Rex v. Hadley, 7 Barn. & Cress. 496.



### § 594. Quorum and majority of definite body.

Ordinarily municipal charters specify the number of votes required to constitute legal action of the council or governing body in any given case.<sup>49</sup> In enacting ordinances or resolutions of a permanent character a majority of the constituent members of the body is generally required, but in passing resolutions or motions of a

*United States.* St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644, 21 L. Ed. 328.

*Colorado.* People v. Wright, 30 Colo. 439, 71 Pac. 365.

*California.* Smith v. Los Angeles I., etc. Assn., 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

*Illinois.* People v. Rhodes, 231 Ill. 270, 83 N. E. 176.

*Iowa.* Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

*Louisiana.* Warnock v. Lafayette, 4 La. Ann. 419.

*Maine.* Cram v. Bangor House, 12 Me. 354.

*Massachusetts.* Sargent v. Webster, 13 Metc. (Mass.) 497; First Parish v. Stearns, 21 Pick. (Mass.) 148.

*Michigan.* Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Ten Eyck v. Pontiac R. R., etc. Co., 74 Mich. 226, 16 Am. St. Rep. 633, 41 N. W. 905.

*Missouri.* Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; State v. Binder, 38 Mo. 450.

*New Hampshire.* Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Attorney General

v. Remick, 71 N. H. 480, 53 Atl. 308.

*New Jersey.* Barnett v. Pater-son, 48 N. J. L. 395, 6 Atl. 15; Cadmus v. Farr, 47 N. J. L. 208; McDermott v. Miller, 45 N. J. L. 251.

*New York.* Madison Ave. Baptist Church v. Baptist Church, 5 Robt. (N. Y.) 649; Field v. Field, 9 Wend. (N. Y.) 396; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

*Pennsylvania.* Craig v. First Presbyterian Church, 88 Pa. St. 42, 32 Am. Rep. 417.

*South Carolina.* State v. Delles-seline, 1 McCord (S. C.) 52.

*Utah.* Leavitt v. Oxford, etc., Silver Min. Co., 3 Utah 265; 4 Am. & Eng. Corp. Cas. 234.

*Wisconsin.* Walker v. Rogan, 1 Wis. 597, 614.

This rule of the common law has often been declared by statute. Horton v. Garrison, 23 Barb. (N. Y.) 176; People ex rel. v. Rec-tor, etc., 48 Barb. (N. Y.) 603, 606.

49. Outwater v. Borough of Carlstadt, 66 N. J. L. 510, 49 Atl. 533.

temporary or mere ministerial nature a majority vote of a legal quorum is usually sufficient.<sup>50</sup>

Following the rule of the common law, in the absence of charter or statutory provision applicable, a majority of the governing body of the corporation, as the board of directors, the board of aldermen, the council, etc., consisting of a definite number, when duly met, constitute a quorum for the transaction of business, and the vote of a majority of those present (there being a quorum) is all that is requisite for the adoption or passage of an ordinance or by-law or motion, or the doing of any other act which the body has power to do.<sup>51</sup> Where the law is

50. Acts done by less than a legal quorum will be held void. *State v. Wilkesville*, 20 Ohio St. 288; *Logansport v. Legg*, 20 Ind. 315; *Price v. R. R.*, 13 Ind. 58; *Ferguson v. Crittenden Co.*, 6 Ark. 479; *Montgomery, etc. Co. v. Citizens, etc. Co.*, 142 Ala. 462, 38 So. 1026.

When *de facto* officer may be created by less than quorum, see *Dingwall v. Detroit*, 82 Mich. 568, 46 N. W. 938.

Presumption respecting quorum. *Insurance Co. v. Sortwell*, 8 Allen (Mass.) 217, which was a case relating to a private corporation.

Less than a quorum cannot convene a session of the council to transact business. *Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271.

The attempt of a less number than a quorum to meet, declare the positions of absent members vacant and then proceed to fill the same is void. *Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271.

51. *Connecticut. Williams v. Brace*, 5 Conn. 190.

*Iowa. Buell v. Buckingham*, 16 Iowa 284; *Thurston v. Heuston*, 123 Iowa 157, 98 N. W. 637.

*Kentucky. Covington v. Boyle*, 6 Bush. (Ky.) 204.

*Maryland. Zeiler v. Central Ry. Co.*, 84 Md. 304, 35 Atl. 932.

*Massachusetts. Dartmouth v. Commissioners*, 153 Mass. 12, 26 N. E. 425; *Sargent v. Webster*, 13 Met. (Mass.) 497; *First Parish v. Stearns*, 21 Pick. (Mass.) 148.

*Missouri. Columbia, etc. Co. v. Meier*, 39 Mo. 53; *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 85 S. W. 112.

*New Jersey. Barnert v. Pater-son*, 48 N. J. L. 395, 400, 6 Atl. 15; *Wells v. Rahway River Co.*, 19 N. J. Eq. (4 C. E. Green) 402.

*New York. Dawes v. N. R. Ins. Co.*, 7 Cowen (N. Y.) 462, 464; *In re Brearton*, 89 N. Y. S. 893, 44 Misc. Rep. 247.

*Ohio. State v. Green*, 37 Ohio St. 227.

*Pennsylvania. Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404.

*Rhode Island. Lockwood v. Mechanic's Nat. Bk.*, 9 R. I. 308.

silent on the subject the common law rule will prevail and cannot be changed by the council, as by fixing the quorum necessary for the transaction of its business at two-thirds of the members elected.<sup>52</sup>

In determining a legal quorum, if the mayor is a member of the body, of course he is to be counted.<sup>53</sup> But if he is not a member he is not to be counted.<sup>54</sup> Ordinarily the whole membership of the body is to be counted. Thus where the seat of a member becomes vacant by resignation, or by removal of an alderman from the ward for which elected, it is error merely to count the remaining members in making up the quorum.<sup>55</sup> So where the

*South Carolina.* State v. Delles-seline, 1 McCord (S. C.) 52, 62.

*Virginia.* Booker v. Young, 12 Gratt. (Va.) 303, 305.

*West Virginia.* McMillin v. Neely, 66 W. Va. 496, 66 S. E. 635.

A majority may assemble, organize and act. Oakland v. Carpenter, 13 Cal. 540.

"In all matters of public concern, the voice of the majority must govern." Per Duncan, J., in McCready v. Guardians, 9 Serg. & R. (Pa.) 94, 99.

Clerk of council is not a member in making a quorum. Swan v. Indianola (Iowa, 1909), 121 N. W. 547.

52. Heiskell v. Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308, 12 Am. & Eng. Corp. Cas. 347; Barnert v. Paterson, 48 N. J. L. 395, 6 Atl. 15; Coles v. Williamsburg, 10 Wend. (N. Y.) 659; Blackett v. Blizard, 9 Barn. & Cress. 851.

53. Griffin v. Messenger, 114 Iowa 99, 86 N. W. 219.

A member chosen as mayor *pro tem* is to be counted as a council-

man for the purpose of a quorum. Shugars v. Hamilton, 122 Ky. 606, 29 Ky. L. Rep. 127, 92 S. W. 564.

54. Atty. Gen'l v. Shepard, 62 N. H. 383, 13 Am. St. Rep. 576; Somerset v. Smith, 20 Ky. L. Rep. 1488, 49 S. W. 456; State v. Porter, 113 Ind. 79, 14 N. E. 883.

55. Pimental v. San Francisco, 21 Cal. 351, 362; McCracken v. San Francisco, 16 Cal. 591; San Francisco v. Hazen, 5 Cal. 169; State v. Orr, 61 Ohio St. 384, 56 N. E. 14.

As to what constitutes a quorum, see note to Lawrence v. Ingersoll, 6 L. R. A. 308; Smith v. Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403; State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832.

Particular case, Bybee v. Smith, 22 Ky. L. Rep. 467, 1684, 61 S. W. 15.

Where council consisted of eight aldermen and mayor and terms of four expired, three held a valid quorum to fill vacancies. People v. Wright, 30 Colo. 439, 71 Pac. 365.

charter provided that a majority of those elected should constitute a quorum, and eight members were elected of whom one was disqualified, it was held that five eligible members were indispensable to form a quorum.<sup>56</sup>

In the absence of organic provision to the contrary, members present though not voting may be counted to constitute the quorum.<sup>57</sup> The Supreme Court of the United States has held this rule applicable to the National House of Representatives.<sup>58</sup>

56. *Saterlee v. San Francisco*, 23 Cal. 314; *Wood v. Gordon*, 58 W. Va. 321, 52 S. E. 261.

57. *Illinois. Launtz v. People ex rel.*, 113 Ill. 137, 142, 55 Am. Rep. 405.

*Indiana. Rushville Gas Co. v. Rushville*, 121 Ind. 206, 209, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315.

*New Hampshire. Atty. Gen'l v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576; *Atty. Gen'l v. Remick*, 71 N. H. 480, 53 Atl. 308.

*New York. In re Brearton*, 89 N. Y. S. 893, 44 Misc. Rep. 247.

*Ohio. State ex rel. v. Green*, 37 Ohio St. 227, 234.

*Montana. State ex rel. v. Yates*, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205.

*Virginia. Booker v. Young*, 12 Gratt. (Va.) 303, 307.

58. Those present though not voting may be counted. In February, 1890, the rule was adopted by the House, providing that, members present and not voting should be counted in determining a quorum. An act was passed by a majority vote of the members present, the quorum being counted in accordance with the rule. The validity of the act was questioned. Mr. Justice Brewer in delivering

the opinion of the court observed: "All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

"But how shall the presence of a majority be determined? The constitution has prescribed no method of making this determination, and it is, therefore, within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to

While it is undoubtedly true that no legislative body can act legally without the presence of a quorum, a less number than a quorum have the power to adjourn.<sup>59</sup>

**§ 595. Quorum and majorities of boards, commissioners, committees, etc.**

In the absence of law to the contrary, where authority to do an act of a public nature is given by law to more persons than one, which act is merely ministerial in character, a majority at least must concur and unite in the performance of it; but they may act separately and need not be convened in a body or notified so to convene for that purpose.<sup>60</sup> However, if the act is one which

prescribe a method for ascertaining the presence of a majority and thus establish the fact that the house is in a condition to transact business. As appears from the journal, at the time this bill passed the house there was present a majority, a quorum, and the house was authorized to transact any and all business." U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321.

Where majority present refrain from voting, act held void. *Gosling v. Veley*, 4 H. of L. Cas. 679, 740.

Majority and casting vote. 6 L. R. A. 308, n.

59. *Smith v. Law*, 21 N. Y. 296; *Kimball v. Marshall*, 44 N. H. 465; 1 Starr & Curtis Ill. Stat. p. 685, par. 37; *Duniway v. Portland*, 47 Ore. 103, 81 Pac. 945.

Less than quorum may adjourn. Where the statute provides that a majority of the council shall constitute a quorum less than a quorum cannot adjourn, and acts done at such adjourned

meeting are void and cannot be ratified. *Pennsylvania Co. v. Cole*, 132 Fed. (Ind.) 668.

At a council meeting less than a quorum were present. The meeting adjourned to a future day, at which time another adjournment was taken. First adjournment was held to be irregular because of the lack of a quorum, yet it was held that it would be presumed that a quorum was present at the second and that a regular adjournment was then taken. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

60. *Perry v. Tynen*, 22 Barb. (N. Y.) 137, 140.

**Act of majority.** The concurrence of a majority of commissioners appointed to appraise lands to be condemned for public use binds the minority. In the execution of a power delegated for purposes purely private it is necessary that all should concur in the act as in cases of trustees, arbitrators, etc. But if the persons be entrusted with powers in some

requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless provision is otherwise made by law; the persons to whom the authority is given must meet and confer together and be present when the act is performed, in which case the majority of them may perform the act; or, after all

respects of a general nature, or for public objects, if all are acting a majority will conclude the minority and their act is the act of the whole. *Young v. Buckingham*, 5 Ohio 485, 489; *Green v. Miller*, 5 John (N. Y.) 39; *Astor v. Mayor, etc.*, New York, 62 N. Y. 567, 580; *Schenck v. Peay*, 1 Woolw. C. C. 175, 187; *Walker v. Rogan*, 1 Wis. 597, 614; *Allegheny Commissioners v. Lecky*, 6 Serg. & R. (Pa.) 170; *Cooper v. Lampeter Tp.*, 8 Watts (Pa.) 125, 128.

Less than a majority cannot act. *Petrie v. Doe*, 30 Miss. 698; *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232; *Somerset Tp. v. Parson*, 105 Pa. St. 360; *Steeley v. Irvine*, 6 S. & R. (Pa.) 128.

Being public officers a majority of a committee appointed for special purpose may act. *Junkins v. Union School Dist.*, 39 Me. 220; *Keyser v. Sunapee*, 35 N. H. 477; *Caldwell v. Harrison*, 11 Ala. 755.

Act of a majority of the overseers of the poor is valid, when. *Wolcott v. Wolcott*, 19 Vt. 37, 39.

When power to fill vacancy by death vests in the survivors in absence of provision of law therefor, see *People ex rel. v. Syracuse*, 63 N. Y. 291, reversing 2 Hun 433, and distinguishing *People v. Nosstrand*, 46 N. Y. 375.

Although vacancies occur by death if a majority survive a quorum remains. *Commonwealth ex rel. v. Canal Commissioners*, 9 Watts. (Pa.) 466.

A majority of a prudential committee of a school district may lawfully act officially, especially after a refusal of the minority to meet with them. *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99.

A majority of those qualified to serve may act on the ground of necessity and public convenience. *State v. Higgins, Harper* (S. C.) 139, 141, 142.

A majority of the board of supervisors of a county, a quorum being present, can perform any act which a majority could perform if all were present. *People ex rel. v. Harrington*, 63 Cal. 257.

A statute validating the report signed by two commissioners out of three, appointed to assess damages in widening a street, is valid although the state constitution provides that compensation shall be ascertained by a jury, or by not less than three commissioners. In *re Broadway*, 63 Barb. (N. Y.) 572, 577; In *re Church Street*, 45 Barb. (N. Y.) 455.

of them have been notified to meet, a majority having met will constitute a quorum of sufficient number to perform the act.<sup>61</sup> This is the common law rule.<sup>62</sup>

61. *Martin v. Lenion*, 26 Conn. 192, 193; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Perry v. Tynen*, 22 Barb. (N. Y.) 137; *Ex parte Rogers*, 7 Cowen (N. Y.) 526, and note, pp. 530-534; In re *Beekman*, 31 How. Pr. (N. Y.) 16; In re *Sewer in 34th Street*, 31 How. Pr. (N. Y.) 42, 51; *Ballard v. Davis*, 31 Miss. 525, 535; *Horton v. Garrison*, 73 Barb. (N. Y.) 176; *Baltimore Turnpike*, 5 Binney 481, 484; *McCready v. Guardians*, 9 Serg. & P. (Pa.) 94, 99; *Crist v. Brownsville Tp.*, 10 Ind. 461.

**Must act together.** Judicial power delegated to two or more must be executed jointly, as for example, the power of removal of officers conferred upon the mayor and council. *Charles v. Hoboken*, 27 N. J. L. 203, 205, and cases.

Where one of two commissioners dies the remaining commissioner cannot act. *Pell v. Ulmar*, 21 Barb. (N. Y.) 500.

Where two overseers of the poor unite in beginning an action one alone without the concurrence or consent of the other has no power to discontinue the suit. *Perry v. Tynen*, 22 Barb. (N. Y.) 137, 141.

**Sale of land made by one of two commissioners, held void.** Both must be present and concur in the sale as act involves the exercise of judgment and discretion. *Powell v. Tuttle*, 3 N. Y. 396; *N. Y. Life Ins. & P. Co. v. Staats*, 21 Barb. (N. Y.) 570.

When acts of one of two overseers of the poor will be held valid, see, *Downing v. Rugar*, 21 Wend. (N. Y.) 178.

It has been held that the act may be done legally by the direction or with the concurrence of a majority of the quorum so assembled. *Damon v. Granby*, 2 Pick. (Mass.) 345.

Where law requires three to constitute a board of assessors, and only two qualify and act the tax assessed by them is illegal. *Williamsburg v. Lord*, 51 Me. 599.

In the absence of contrary provision by law a majority of a quorum of a judicial body can act. *McFarland v. Crary*, 16 Wend. (N. Y.) 295; *Aultman v. Utsey*, 35 S. C. 596; *Williams v. Bennett*, 35 S. C. 150; *Sullivan v. Speights*, 14 S. C. 358; *Merchant v. North*, 10 Ohio St. 251; *Louisville, etc. R. R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637.

**Contra.** In an early case the Connecticut court held that where the act requires the exercise of judgment and discretion a majority of the persons on whom the authority is conferred may perform it, and that they may act separately for that purpose, and need not act in a board or collectively. *Gallup v. Tracy*, 25 Conn. 10.

62. *Gridley v. Baker*, 1 Bos. & Pul. 229; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Perry v. Tynen*, 22 Barb. 137.

In the absence of affirmative proof to the contrary, the presumption is that the committee or commissioners or persons designated to perform the act all met, or what is equivalent to it, that the absent members had notice of the meeting which was held.<sup>63</sup>

### § 596. When definite vote required.

The law governing the body often provides that certain acts may be done only by a majority of the members appointed or elected to the body. Under such provisions it is apparent that the acts specified may not be done legally by a bare majority of a quorum.<sup>64</sup> In the enactment of certain ordinances, as for the sale of corporate property, or for the creation of offices and positions, or improvement ordinances where the improvements are to be paid for by special taxation, especially in event of remonstrance or protest on the part of the property owners, or where the improvement ordinance does not originate on petition of the property owners, charters often require a two-thirds or three-fourths vote of the entire membership of the body. Of course, the vote of a less number than specified is insufficient, and the record of the pro-

63. *Astor v. New York*, 62 N. Y. 567, 576, 580; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 19.

64. *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Pimental v. San Francisco*, 21 Cal. 351; *McCracken v. San Francisco*, 16 Cal. 591; *State v. Dickie*, 47 Iowa 629; *Marion Water Co. v. Marion*, 121 Iowa 306, 314, 317, 96 N. W. 883.

Majority vote required. A resolution purporting to fix the

salary of an official, held to be a resolution for the appropriation of money under a particular charter requiring such resolution to be passed by a majority vote. *Fournier v. West Bay City*, 94 Mich. 463, 54 N. W. 277.

Council consists of fourteen. A vacancy occurred. Thirteen cannot be regarded as entire number in determining majority required. *McLean v. East St. Louis*, 222 Ill. 510, 78 N. E. 815.



ceedings must show that the measure received the vote prescribed.<sup>65</sup>

65. *Illinois.* Carrollton v. Clark, 21 Ill. App. 74; Schofield v. Hudson, 56 Ill. App. 191; People v. Maxton, 38 Ill. App. 152; Lindsay v. Chicago, 115 Ill. 120, 3 N. E. 443; Chicago Dock Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Belknap v. Miller, 52 Ill. App. 617; Rich v. Chicago, 59 Ill. 286; Barr v. Auburn, 89 Ill. 361.

*Indiana.* Moberry v. Jeffersonville, 38 Ind. 198; Pittsburg, etc. R. R. Co. v. Crown Point, 150 Ind. 536, 50 N. E. 741; Brookbank v. Jeffersonville, 41 Ind. 406; Rushville Gas Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388; Logansport v. Legg, 20 Ind. 315; Fralich v. Barlow, 25 Ind. App. 383.

*Iowa.* Horner v. Rowley, 51 Iowa 620, 2 N. W. 436.

*Kentucky.* Lexington v. Headley, 5 Bush. (Ky.) 508; Louisville v. Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594.

*Michigan.* Whitney v. Hudson, 69 Mich. 189, 30 Am. & Eng. Corp. Cas. 453, 37 N. W. 184; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; Fournier v. West Bay City, 94 Mich. 463, 54 N. W. 277.

*Minnesota.* State v. Priestester, 43 Minn. 373, 45 N. W. 712.

*Missouri.* O'Dwyer v. Monett, 123 Mo. App. 184, 100 S. W. 670.

*New Jersey.* Mueller v. Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89; Clark v. Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

*Ohio.* Resolution awarding a contract is not of a "general of permanent nature," and therefore

does not require a two-thirds vote. Cincinnati v. Bickett, 26 Ohio St. 49.

*Washington.* Cline v. Seattle, 13 Wash. 444, 43 Pac. 367.

A resolution to expend money for a public improvement adopted by less than two-thirds is inoperative for the purpose of raising money by taxation, but valid as an application of funds already on hand for the purpose of the improvement. Vossen v. St. Clair, 148 Mich. 286, 112 N. W. 746.

Under a charter providing that no resolution or proceeding of the council imposing taxes or assessments and no ordinance should be passed at the meeting at which it was introduced if there be any objection made thereto and no ordinance should be passed except by a two-thirds vote taken by yeas and nays, a resolution fixing the assessment district for a street improvement and determining the taxes to be paid by the different owners need not be adopted by a two-thirds vote. Auditor General v. Hoffman, 132 Mich. 198, 93 N. W. 259, 9 Det. Legal N. 571.

A formal levy of special assessment is necessary to bind the property. Hall v. Moore, Neb. (1902), 92 N. W. 294.

An ordinance imposing a license fee on saloon keepers does not provide for such a tax as requires a two-thirds vote of the council to adopt. Kenaston v. Ricker, 146 Mich. 163, 109 N. W. 278, 13 Det. Leg. News. 709.

Where any particular act is required to be done by a specified vote, the question has often arisen whether such provision means a majority or two-thirds or three-fourths of the whole number of members composing the body, or whether it means a majority or two-thirds or three-fourths of a legal quorum. The rule as applied to state legislatures is generally held to be that proportion of votes of those constituting the quorum to do business. Thus where the constitution requires the act to receive "the vote of two-thirds of each house," it is held to be two-thirds of the members present, there being a quorum.<sup>66</sup> Adopting such construction, where the power of a motion was conferred upon a city council to be exercised "by a vote of two-thirds of that body," two-thirds of a legal quorum, and not two-thirds of the whole number of members composing the council, was considered to be meant.<sup>67</sup> So "unanimous consent of the council," as used in a council rule, was construed in like manner.<sup>68</sup> But where the act must be done by a distinct proportion "of all the members elected," or "of all of the members of the council," it is manifest that the law should be construed by counting the whole membership of the body in question.<sup>69</sup>

66. *State v. McBride*, 4 Mo. 303, 308; *Southworth v. P. & J. R. R.*, 2 Mich. 287; *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184, 30 Am. & Eng. Corp. Cas. 453, n.; *Green v. Weller*, 32 Miss. 650, 700; *Morton v. Comptroller Gen.*, 4 S. C. 430, 463.

67. *Warnock v. Lafayette*, 4 La. Ann. 419.

A charter provision requiring a two-thirds vote of the city council to do a specified act, held to import a two-thirds vote of a quorum present and voting. *English v. State*, 7 Tex. App. 171.

68. *Atkins v. Phillips*, 26 Fla. 281, 296, 8 So. 429; *Zeller v. Cen-*

*tral R. R. Co.*, 84 Md. 304, 35 Atl. 932.

69. *Florida. Atkins v. Phillips*, 26 Fla. 281, 296, 8 So. 429.

*Nebraska. State ex rel. v. Gray*, 23 Neb. 365, 369, 36 N. W. 577.

*New Hampshire. Atty. Gen'l v. Shepard*, 63 N. H. 383, 13 Am. St. Rep. 576.

*New Jersey. State v. Bayonne*, 54 N. J. L. 125, 22 Atl. 1006; *Muel-ler v. Egg Harbor City*, 55 N. J. L. 245, 26 Atl. 89; *State ex rel. Schermerhorn v. Jersey City*, 53 N. J. L. 112, 20 Atl. 829; *State ex rel. v. Paterson*, 35 N. J. L. 190.

Where vacancies occur the whole number entitled to membership must be counted and not merely the remaining members.<sup>70</sup> Where the charter provides definitely the number that shall constitute a quorum, this cannot be changed by the body.<sup>71</sup> Thus, where the charter prescribes that three councilmen and the mayor shall constitute a quorum, a resolution passed by a vote of three councilmen and the mayor, who had a vote in case of a

*West Virginia.* Davis v. Davis, 40 W. Va. 464, 21 S. E. 906.

**Definite vote required.** "Concurrence of a majority of all of the trustees," construed (*arguendo*) as a majority of all of the trustees of which the body was composed, but such was held not to be required in the passage of a resolution proposing a change in the corporate boundaries under another charter provision. Strohm v. Iowa City, 47 Iowa 42, 45, 46. The punctuation employed was disregarded. Shriedley v. State, 23 Ohio St. 130, 139; Randolph v. Bayue, 44 Cal. 366.

Where a street being vacated by ordinance, on condition, it was held that a subsequent resolution declaring the vacation absolute is sufficient notwithstanding such resolution was passed by a majority instead of two-thirds as required in passing the ordinance. Wirt v. McEnery, 21 Fed. 233.

Under a particular charter provision it was held that, the requirement of a six-eighths vote on appropriations applied only to expenditures outside of the necessary expenses. Gardner v. New Bern, 98 N. C. 228, 3 S. E. 500.

Under a charter providing that a tax must be voted by two-thirds of the members elected; held that

a vote of eight aldermen in a council consisting of twelve would be sufficient. Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721.

Five held a sufficient majority where a three-fourths vote was required, the body consisting of seven originally and one having resigned. Board of Commissioners, etc. v. Loan & Trust Co., 143 N. C. 110, 55 S. E. 442.

70. Pimental v. San Francisco, 21 Cal. 351; McCracken v. San Francisco, 16 Cal. 591; San Francisco v. Hazen, 5 Cal. 169; Polasky v. Schmid, 128 Mich. 699, 55 L. R. A. 614, 87 N. W. 1030, 8 Detroit Leg. N. 845.

**Contra.** State ex rel. v. Orr, 61 Ohio St. 384, 56 N. E. 14.

The vote of one, who is ineligible to act as councilman, but who was elected and sworn into office, was counted in one case. Satterlee v. San Francisco, 23 Cal. 314.

**Contra.** Held in this case that neither the office of mayor, who presided and had a vote in the event of a tie, nor the position of a deceased member, was to be counted in arriving at, "a majority of the members of the whole council." Nalle v. Austin, 41 Tex. Civ. App. 443, 93 S. W. 141.

71. Malloy v. Board of Education, 102 Cal. 642, 36 Pac. 943.

tie, was held legally passed, although a by-law provided that no resolution should pass without the votes of two-thirds of all the members.<sup>72</sup>

### § 597. Vote necessary in suspending rules.

It is within the power of all deliberative bodies to abolish, modify or waive their own rules, as those requiring certain ordinances to be read on two or three different days, or that certain corporate acts shall receive a two-thirds or three-fourths vote.<sup>73</sup>

In accordance with the principle stated in the last section, the rule permitting suspension of rules on "two-thirds vote of the members of the branch" (the council

72. *Outwater v. Carlstadt*, 66 N. J. L. 510, 49 Atl. 533.

73. *Holt v. Somerville*, 127 Mass. 408, 411; *Bennett v. New Bedford*, 110 Mass. 433, 437; *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860.

**Suspending rules.** Only one ordinance can be passed under a suspension of the rules. If two are enacted under one suspension, the second is void. *Bloom v. Xenia*, 32 Ohio St. 461; *Campbell v. Cincinnati*, 49 Ohio St. 463, 31 N. E. 606.

Where a by-law required certain corporate acts to be done in a prescribed form and that amendment or repeal of such by-law should only be made by a vote of two-thirds of the members, it was held that a majority might repeal the by-law, or might, even without specific repeal do valid acts not as required by the by-law, by a bare majority vote. Opinion of Gibson, C. J., in *Commonwealth v. Lancaster*, 5 Watts (Pa.) 152; *S. P. Chariton v. Holliday*, 60 Iowa 391, 14 N. W. 775.

Rules adopted by the council itself and not prescribed by any superior power, may be suspended by unanimous consent. *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460.

**Council rule cannot be amended** by a majority vote without previous notice, when the law so requires. *Armatage v. Fisher*, 74 Hun (N. Y.) 167, 26 N. Y. S. 364.

A city council is not bound to act in accordance with its rules or by-laws but may waive them. *Sedalia v. Scott*, 104 Mo. App. 595, 78 S. W. 276.

And this is impliedly done when action is had not in accordance therewith. *Bradford v. Jellico*, 1 Tenn. Ch. App. 700.

Under a rule that certain action should not be taken without the concurrence of two-thirds of each branch of the city council, voting by yeas and nays, such action taken by less than the requisite two-thirds is void. *Blood v. Beal*, 100 Me. 30, 60 Atl. 427.

consisting of two branches), will be construed to mean two-thirds of those present, not being less than a legal quorum and not two-thirds of the entire membership of the branch.<sup>74</sup> So a charter provision which permitted a suspension of the rule requiring ordinances to be read on three different days unless three-fourths of "the council" shall dispense with the rule, was held sufficiently complied with where there were present four councilmen, all of whom voted for the suspension—the entire council consisting of six members, of whom one had resigned and another was absent when the suspension took place.<sup>75</sup>

But where a charter required ordinances levying special assessments to be read on three successive days unless three-fourths of the council shall vote to dispense with the rule, a vote of five members of the council composed of six councilmen and the mayor is insufficient to suspend the rule and an ordinance so passed is void.<sup>76</sup> So where the council consists of seven members, under like provision, the rules cannot be suspended by an affirmative vote of four members.<sup>77</sup>

74. *Zeiler v. Central Railroad Co.*, 84 Md. 304, 35 Atl. 932.

An ordinance providing that all ordinances shall be read three times before being passed, and that no ordinance shall pass or be read the third time on the same day in which it was introduced unless the rule be suspended by a two-thirds vote, cannot be annulled or repealed by a mere majority vote. *Swindell v. State ex rel.*, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

75. In the passage of ordinances a vote of a majority "of all members elected to the council" was required, but three-fourths of "the council," without the qualifying words had power to suspend the rule. *North Platte v. North*

*Platte Water Works Co.*, 56 Neb. 403, 76 N. W. 906.

A charter provision which required ordinances to be read on three different days unless the reading is "dispensed" with by a vote of three-fourths of the council, is observed by a three-fourths vote to "suspend" the rule, as there is no substantial difference between the words. *Bayard v. Baker*, 76 Iowa 220, 222, 40 N. W. 818, 23 Am. & Eng. Corp. Cas. 126.

76. *Griffin v. Messenger*, 114 Iowa 99, 86 N. W. 219.

77. *Horner v. Rowley*, 51 Iowa 620, 2 N. W. 436.

Passage under suspension of rules in particular cases:

*Florida*. *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429, 10 L. R. A. 153.

### § 598. Quorum and majority in elections by the council.

In absence of specific direction in the controlling law, the general rule is that the majority of the members of the municipal legislative body constitute a quorum for the appointment or election of officers or subordinates.<sup>78</sup> Sometimes it is not sufficient that a candidate receive a plurality of the votes cast, or as stated in a Tennessee case, a majority if blank ballots are excluded, "His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote. It is not sufficient that a majority were not cast against him; to be elected the majority must be cast for him."<sup>79</sup> Where, therefore, at an election to fill an office

*Iowa.* Cutcomp v. Utt, 60 Iowa 156, 14 N. W. 214.

*Kentucky.* Nevin v. Roach, 86 Ky. 492, 5 S. W. 546.

*Louisiana.* New Orleans v. Brooks, 36 La. Ann. 641.

*Minnesota.* State v. Priester, 43 Minn. 373, 45 N. W. 712.

*Missouri.* Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946.

*Ohio.* Campbell v. Cincinnati, 49 Ohio St. 463, 31 N. E. 606.

*Pennsylvania.* Barton v. Pittsburgh, 4 Brewst. (Pa.) 373.

Presumption that rule was legally suspended. State v. Vail, 53 Iowa 550, 5 N. W. 709.

78. When the body is legally convened, a majority of such quorum may act.

*Connecticut.* State v. Chapman, 44 Conn. 595.

*Delaware.* State v. Wilmington, 3 Harr. (Del.) 294.

*Michigan.* Baker v. Port Huron, 62 Mich. 327, 28 N. W. 913.

*New Jersey.* Cadmus v. Farr, 47 N. J. L. 208; State v. Parker,

32 N. J. L. 341; Mason v. Pater-son, 35 N. J. L. 190.

*New York.* In re Brearton, 44 Misc. Rep. 247, 89 N. Y. S. 893; Coles v. Williamsburg, 10 Wend. 659.

79. Vote necessary to choice. If the law so requires in express terms which is sometimes the case, a majority of the whole body is necessary to a choice. People v. Herring, 30 Colo. 275, 71 Pac. 443; Hawkins v. Cook, 62 N. J. L. 84, 40 Atl. 781; Armstrong v. Whitehead, 67 N. J. L. 405, 51 Atl. 472.

Examine:

*Maine.* State v. Phillips, 79 Me. 506.

*Maryland.* Murdock v. Strange, 99 Md. 89, 57 Atl. 628.

*Michigan.* Conrad v. Stone, 78 Mich. 635, 639, 44 N. W. 333; Randall v. Schweikart, 115 Mich. 386, 73 N. W. 417.

*Mississippi.* Bousquet v. State, 78 Miss. 478, 29 So. 399.

*Ohio.* State v. Miller, 62 Ohio St. 436, 78 Am. St. Rep. 732, 57 N. E. 227.

there were present the mayor and eight aldermen, the body consisting of nine, four votes were cast for L., three for F and one blank ballot, there is no election. The mayor declared L. elected but he had no vote except in case of a tie. Upon motion to reconsider there were four votes for and four against. The mayor without casting his vote declared the motion lost. Held, L. not entitled to the office.<sup>80</sup>

*United States.* Yulie v. Malory, 2 Congressional Election Cases 608.

Notice of meeting. People v. Batchelor, 22 N. Y. 128.

Failure to attend, after due notice will not affect result. State v. Withers, 121 N. C. 376, 28 S. E. 522.

If a quorum is present, refusal to vote will not defeat action.

*Connecticut.* State v. Chapman, 44 Conn. 595.

*Illinois.* Launtz v. People, 113 Ill. 137, 55 Am. Rep. 405.

*Kentucky.* Wheeler v. Com., 98 Ky. 59, 17 Ky. L. Rep. 636, 32 S. W. 259.

*Maryland.* Murdock v. Strange, 99 Md. 89, 57 Atl. 628.

*Montana.* State v. Yates, 19 Mont. 239, 37 L. R. A. 205, 47 Pac. 1004.

*New Hampshire.* Atty. Gen. v. Shepard, 64 N. H. 384, 13 Am. St. Rep. 576.

*New York.* In re Brearton, 44 Misc. Rep. 247, 89 N. Y. S. 893.

*Ohio.* State v. Green, 37 Ohio St. 227.

*England.* Oldknow v. Wainwright, 2 Burr. 1017.

For legally, the effect to acquiesce is choice. Sowers v. Bridgeport, 60 Conn. 521, 22 Atl. 1015.

80. Lawrence v. Ingersoll, 88 Tenn. 52, 65, 6 L. R. A. 308, 17 Am. St. Rep. 870, 12 S. W. 422, dissenting opinion by Turney, C. J.

Vote required to elect. In electing officers by a council blank ballots are to be counted in determining the whole number of votes cast. State ex rel. Cole v. Chapman, 44 Conn. 595.

Where the election is to be "by the vote of a majority of its members," a vote of less than a majority of the whole number elected does not elect.

State ex rel. v. Paterson, 35 N. J. L. 190; State ex rel. v. Alexander, 107 Iowa 177, 77 N. W. 841.

See McDermott v. Miller, 45 N. J. L. 251.

In a Connecticut case at a school election, the election was to be decided by a majority vote of the qualified members present. It was held that one receiving forty-six votes out of ninety-seven ballots cast is not elected, although the chairman announces a legal election and on objection being made, the decision of the chair was sustained with but few dissenting voices. Here the court said: "Our government and our institutions rest on the principle that controlling power is vested in the majority. In the

Where the charter requires that one of the members of the council shall be elected president, but does not provide the number of votes necessary to a choice the rule is that a vote of a majority of a quorum duly convened is sufficient.<sup>81</sup>

If there are only twelve members of a council present, and therefore the body being only entitled to twelve votes, but thirteen votes are cast for the officer to be elected, seven in favor of the contestant and six for another person, there is no legal election.<sup>82</sup>

Willcock declares the common law rule, as follows: "After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an

absence of any provision by law to the contrary the will of any community or association, body politic or corporate is properly declared only by the voice of the majority." Per Foster, J., in *State ex rel. v. Fagan*, 42 Conn. 32, 35.

It is proper to count a vote that cannot be read as scattering. *Keough v. Holyoke*, 156 Mass. 403, 37 N. E. 387.

81. *Cadmus v. Farr*, 47 N. J. L. 208.

82. *Labourdette v. New Orleans*, 2 La. Ann. 527.

**Vote necessary — particular case.** In a case arising in Michigan, the meeting was *illegally* declared adjourned by the president who left the chair. An alderman was called to fill his place, whereupon for the purpose of breaking the quorum and preventing the

transaction of any further business, enough left, to leave one less than a quorum. The remaining councilmen proceeded with the business of selecting election officers for the general election which was about to be held. While the court held the proceedings illegal, as no quorum was present, it declared that "the people of Detroit cannot be disfranchised by such proceedings, and the registration in that city which has now taken place, the appointees of the meeting \* \* \* acting upon such board, is valid, and cannot be interfered with. They must be held *de facto* officers as far as they have acted from the very necessity of the case. But none of them can act hereafter." *Dingwall v. Detroit*, 82 Mich. 568, 571, 572, 46 N. W. 938.



assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly protest against any election at that time or even the election of the individual who has the majority of votes. The only manner in which they can effectually prevent his election is by voting for some other qualified person." <sup>83</sup>

This rule was adopted in a case determined by the Supreme Court of Ohio. The council was composed of eighteen members and the mayor was the presiding officer. At a meeting, duly convened, upon motion to elect a clerk nine voted and nine protested against that mode of electing. The election was held legal, the court observing that those declining to vote must be deemed to acquiesce in the choice of those who do.<sup>84</sup>

In an Illinois case the question of the approval of a bond of an officer was under consideration. The council consisted of eight aldermen and the mayor. Five mem-

83. Willcock, *Mun. Corp.*, 546; Grant on *Corp.*, 71; Angell & Ames on *Corp.*, §§ 126, 127; 2 *Kyd. on Corp.*, 12, 13; *Booker v. Young*, 12 *Gratt. (Va.)* 303, 307.

**Cases illustrating necessary vote.** Under a council regulation providing that "a majority of the members elected and voting shall be necessary to choose any officer elected by the board" a candidate who receives six votes of the twelve members present, three not voting, is elected. *Morton v. Youngerman*, 89 *Ky.* 505, 12 *S. W.* 944, 11 *Ky. L. Rep.* 886.

In choosing officers necessary to affect the organization of the council the plurality of the votes cast is sufficient, provided there be a quorum present. *State v. Anderson*, 45 *Ohio St.* 196, 12 *N. E.* 656.

The council consisted of six members. The council met and proceeded to organize by electing a president. A received three votes, C, 2 and H, 1. Held, A was legally elected. *State v. Anderson*, 45 *Ohio St.* 196, 12 *N. E.* 656.

Appointment of police commissioners means majority of all members. *Baker v. Police Commissioners*, 62 *Mich.* 327, 28 *N. W.* 913.

Must ascertain result and declare who elected. *Price v. Brock*, 79 *N. C.* 600.

Method of voting in particular case. *People v. Crissey*, 91 *N. Y.* 616.

84. *State ex rel. v. Green*, 37 *Ohio St.* 227, 232.

*Contra.* *State ex rel. v. Alexander*, 107 *Iowa* 177, 77 *N. W.* 841.

bers were present, and a majority of those present voted to approve the bond and the minority protested, the action was held valid in accordance with the common law rule.<sup>85</sup>

In event of election by an indefinite number, as an election by the people, the common-law rule is that a plurality of votes elect, that is, the candidate receiving more votes than any other is elected, although he does not receive a majority of the votes cast.<sup>86</sup> This principle has been embodied in most of the statutes concerning elections of the various states.<sup>87</sup> As we have seen, it is applicable to the elections of towns by the inhabitants thereof at town meeting.<sup>88</sup>

In case the mayor is given a deciding vote in event of a tie, under a charter which requires the officer to be elected by a majority of the votes of all of the aldermen, the mayor can only cast a deciding vote in favor of a candidate when the entire board of aldermen are equally divided between two candidates; he cannot vote to make a majority in favor of one candidate when the other votes are scattering.<sup>89</sup>

The power of the board of aldermen to elect its own officers and attendants is not affected by statutes regulat-

85. *Launtz v. People ex rel.*, 113 Ill. 137, 142, 55 Am. Rep. 405.

86. See § 418 *ante*.

87. § 418 *ante*.

88. § 577 *ante*.

89. *State ex rel. v. Mott*, 111 Wis. 19, 86 N. W. 569.

See *Ott v. State*, 78 Miss. 487, 29 So. 520; *State ex rel. v. Alexander*, 107 Iowa 177, 77 N. W. 841.

See § 590 *ante*.

Where an election of an officer by the council is being held, under a charter allowing the body to determine its own rules of proceeding after several ballots with no result, a resolution providing that the candidate receiving the

lowest vote may be dropped, is valid, and one voting for a candidate so dropped will be counted as not voting. *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259.

**Removal.** Where a majority appoints, a majority may remove an officer where the officer is removable at the pleasure of the council. *Madison v. Korbly*, 32 Ind. 74; *Madison v. Kelso*, 32 Ind. 79.

Erroneous announcement of vote by mayor is not binding. *Chariton v. Holliday*, 60 Iowa 391, 14 N. W. 775.

ing appointments in the civil service and giving preference to veteran soldiers.<sup>90</sup> An appointment of an officer, made by a legislative body, by ballot, is not complete until the result of the ballot is ascertained and announced.<sup>91</sup> In balloting for the election of an officer by the council, an announcement that there were more ballots than members voting was not an announcement of the election of relator, precluding the council from taking a new ballot.<sup>92</sup>

### § 599. How quorum affected by interest of members.

Many charters expressly provide that the officers of the corporation shall not be directly or indirectly interested pecuniarily in contracts of any character with the corporation.<sup>93</sup> So members of the legislative body should not be permitted to act in matters before them, as a body, in which they are either directly or indirectly pecuniarily interested. Such persons are generally excluded in counting a quorum.<sup>94</sup>

90. *Shaughnessy v. Fornes*, 172 N. Y. 323, 65 N. E. 168.

91. *State v. Starr*, 78 Conn. 636, 63 Atl. 512.

92. *State v. Starr*, 78 Conn. 636, 63 Atl. 512.

93. Contracts between the city and members of the council held void. *Smith v. Albany*, 61 N. Y. 444; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420; *Sturr v. Elmer*, 75 N. J. L. 443, 67 Atl. 1059.

The action of the common council in allowing a claim of a materialman against the city where they were themselves personally liable by reason of their failure to require a bond of the contractor, is invalid. *Smith v. Heubell*, 142 Mich. 637, 106 N. W. 547.

See § 513 *ante*.

94. *Connecticut*. *Woodruff v. New York & N. E. R. R. Co.*, 59 Conn. 63, 20 Atl. 17.

*Indiana*. *Ft. Wayne v. L. S. & M. S. Ry. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, note.

*Washington*. *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

*Wisconsin*. *United Brethren Church v. Van Dusen*, 37 Wis. 54; *Pickett v. School District*, 25 Wis. 551; *Walworth Bank v. Farmers' Loan & T. Co.*, 16 Wis. 629; *Oconto County Supervisors v. Hall*, 47 Wis. 208, 2 N. W. 291.

*Canada*. *Hewison v. Tp. of Pembroke*, 6 Ont. Rep. 170.

**Councilmen cannot be interested.** Rule of council forbidding members to vote upon question in which they are interested, which

If members of the council are stockholders in a water company, which the council, in behalf of the municipal corporation, votes to purchase, the courts, on the ground of sound policy, will refuse to enforce the contracts irrespective of the question of intention. And the same salutary rule applies where it appears that councilmen who vote for a contract to supply the local corporation and its inhabitants with water are stockholders in the company with which the contract is made.<sup>95</sup>

In a Michigan case, it was held that the fact that two of the aldermen who attended the meeting and who were necessary to form the quorum were signers of the petition for the improvement and owners of the land subject to special assessment for the improvement, did not invalidate the council proceedings in ordering the improvement.<sup>96</sup> So it has been held that a member is not

is violated, held to invalidate an ordinance. *Buffington Wheel Co. v. Burnham*, 60 Iowa 493, 15 N. W. 282.

Cases in which it was held that the prohibition did not apply to municipal officers. *Concordia v. Hagaman*, 1 Kan. App. 35, 41 Pac. 133; *Call Pub. Co. v. Lincoln*, 29 Neb. 149, 45 N. W. 245.

Member of water company acting as such commissioner held not interested so as to disqualify him. *Hicks v. Long Branch Com'rs*, 69 N. J. L. 300, 54 Atl. 568.

Councilmen not disqualified to vote in confirmation of special assessment for public improvement because of the fact that they owned land in the assessment district. *Corliss v. Highland Park*, 132 Mich. 152, 93 N. W. 254, 9 Detroit Leg. N. 559, 93 N. W. 610, 9 Detroit Leg. N. 619, 95 N. W. 416.

95. *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 28 Atl. 578; *Milford Borough v. Milford Water Co.*, 124 Pa. St. 610, 17 Atl. 185.

To same effect is *Gregory v. Jersey City*, 34 N. J. L. 390.

96. *Vote of interested members.* *Steckert v. East Saginaw*, 22 Mich. 104, per Cooley, J., who said that the proceedings would have been held invalid had the members of the council acted as commissioners in determining the amount of the special assessment that each piece of property was to bear or as commissioners in confirming the report.

A vote of confirmation of an assessment passed at a meeting of a board consisting of five, at which only four members attended, and in which vote but two concurred, the others being interested declining to vote, is not a valid act

disqualified from voting on an ordinance establishing a sewer district because he owns property within the district.<sup>97</sup> So the fact that a member would be benefited by the widening of a street does not disqualify him from voting on the proposition.<sup>98</sup> But a member is disqualified from voting for an ordinance, granting the use of streets to a corporation in which he is a stockholder or otherwise interested. In such case the member cannot remove the disability by, in form, assigning the stock to a relative.<sup>99</sup>

The fact that the vote of the interested member is not necessary to pass an ordinance seems to be immaterial. Thus in a New Jersey case, a member of a board of public works voted for an ordinance, authorizing a railroad company, in which he was a stockholder, to lay its tracks in the streets and the ordinance was held voidable. It appeared that there was no necessity for the action of

although the two did not vote assented to the vote of their colleagues. *Coles v. Williamsburgh*, 10 Wend. (N. Y.) 659, 666; *State (Winans) v. Crane*, 36 N. J. L. 394.

Where a by-law related to a road and it appeared that C was the only one interested; held where his vote was necessary to pass the by-law such by-law was void, as his interest, which was apart from that of the public, disentitled him from voting. In re *Vashon & Tp. of Hawkesbury*, 30 Up. Can. Com. Pleas Rep. 194.

A member of a municipal board who is either a stockholder or director in a corporation is disqualified to act in a transaction with such corporation. *San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106.

What constitutes interest that will disqualify according to Cushing's Law and Practice of Legislative Assemblies, see *State v. Pinkerman*, 63 Conn. 176, 28 Atl. 110.

Member cannot vote to confirm his own appointment to office. *State ex rel. v. Whitehead*, 67 N. J. L. 405, 51 Atl. 472 But see § 591 *ante*.

97. *Topeka v. Huntoon*, 46 Kan. 634, 26 Pac. 488.

98. *Goff v. Nolan*, 62 How. Pr. (N. Y.) 323.

99. *Jolly v. P. N. I. & C. Ry. Co.*, 25 Pittsb. Leg. J. (N. S.) 259.

Personal interest—effect on vote. 18 L. R. A. 367, note.

the interested member, for there were others who could act without him. "The fact that there were a sufficient number of votes, apart from his vote, to pass the ordinance, is no answer to the objection taken upon this point. The infection of the concurrence of the interested persons spreads so that the action of the whole body is voidable."<sup>1</sup>

### § 600. Quorum of joint assemblies of definite bodies.

In order to constitute a legal meeting for the transaction of business of a body composed of two or more definite bodies it is necessary that a majority of each of the separate bodies should be present.<sup>2</sup> When the meeting has once been duly organized the identity of the component bodies forming it, in legal contemplation, disappears and the vote of the majority of those constituting the joint body who are present controls, even though one of the body should leave before the vote is taken.<sup>3</sup>

1. *State (West Jersey Traction Co.) v. Board of Public Works*, etc., 56 N. J. L. 431, 440, 29 Atl. 163.

The general rule is that no man can be a judge of his own case. *Broom*, Maxims, 111; *Foot v. Stiles*, 57 N. Y. 399; *Regina v. Aberdeen Canal Co.*, 14 Ad. & E. (N. S.) 854; *Matter of Ryers*, 72 N. Y. 1, 11, per Folger, J.

A mayor is not prevented from giving the casting vote upon a motion to pay an attorney's fee where the vote of the aldermen results in a tie because he employed the attorney in the public service but in so doing incurred no personal liability on account thereof. *Smedley v. Kirby*, 120 Mich. 253, 79 N. W. 187, 6 Det.

*Leg. N. 118*, relying on *Taylor v. Normal Highway Commissioners*, 88 Ill. 527.

2. *State ex rel. v. Paterson*, 35 N. J. L. 190, 194; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Commonwealth v. Hargest*, 7 Pa. Co. Ct. 333.

3. *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Whiteside v. People*, 26 Wend. (N. Y.) 634, reversing 23 Wend. (N. Y.) 9; *Ex parte Humphrey*, 10 Wend. (N. Y.) 612, per Savage, C. J.

The two bodies voted to meet jointly on a specified day. On such day a minority of one body were present but those present constituted a majority of both branches. The meeting was held

The rule in England is otherwise. There a majority of each of the definite bodies must be present, to constitute a valid joint meeting, and remain until the business is finished. If one of the integral parts withdraws from the meeting while action is incomplete no further action thereon can be taken legally by those remaining.<sup>4</sup>

#### PROCEEDINGS.

### § 601. Special meetings—notice.

Provision is usually made for calling special meetings. Generally this duty devolves upon the mayor or the presiding officer, and sometimes such meetings may be convened at the instance of a certain number of the members of the body itself.<sup>5</sup> In the absence of express

legal. *Beck v. Hanscom*, 29 N. H. 213, 223, 226, per Gilchrist, C. J., reviewing the English cases.

Election by joint ballot of two branches. *Belfast v. Morrill*, 65 Me. 580; *Saunders v. Lawrence*, 141 Mass. 380, 5 N. E. 840; *Schmubach v. Speidel*, 50 W. Va. 553, 55 L. R. A. 922, 40 S. E. 424; *Kimball v. Marshall*, 44 N. H. 465, 468.

**Contra.** Under a charter provision that a majority of the members of the board of aldermen and the general council shall constitute a quorum for the transaction of business in joint session, a majority of the members of both bodies as a whole and not of each body is meant. *Davis v. Claus*, 125 Ky. 4, 30 Ky. L. Rep. 1082, 100 S. W. 263.

4. *King v. Williams*, 2 Maule & Sel. 141; *King v. Buller*, 8 East 389; *King v. Miller*, 6 Durnf. & East (6 Term Rep.) 268, 278; *King v. Bower*, 1 Barn. and Cress. 492; *Rex v. Varlow*, 1 Cowp. 248; *Rex v. Bellringer*, 4 Term Rep. 810; *Willcock, Mun. Corp.* 52, 53, 54; *Glover, Mun. Corp.* 148.

5. Special meeting held valid. *Douglas v. Baker County*, 23 Fla. 419, 2 So. 776; *Board of Supervisors v. Horton*, 75 Iowa 271, 39 N. W. 394.

In Illinois, the council may prescribe, by ordinance, the manner in which special meetings thereof may be called. 1 Starr & Curtis Ill. Stat., p. 685, § 38. So the mayor or any three aldermen may call. *Ib.*, § 46.

provision a municipal corporation possesses the incidental or implied power to call special meetings of its legislative body.<sup>6</sup> Unless the law otherwise provides notice to each member of the body is required.<sup>7</sup>

6. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 577, 31 S. W. 946.

7. *California*. *Harding v. Vandewater*, 40 Cal. 77.

*Connecticut*. *Stowe v. Wyse*, 7 Conn. 214; *State v. Kirk*, 46 Conn. 395.

*Kansas*. *Rogers v. Slonaker*, 32 Kan. 191, 4 Pac. 138; *Paola, etc. R. R. Co. v. Commissioners*, 16 Kan. 302.

*Maryland*. *Burgess v. Pue*, 2 Gill. (Md.) 254.

*Massachusetts*. *Wiggin v. Free-will Baptist*, 8 Met. (Mass.) 301.

*New York*. *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *Ex parte Rogers*, 7 Cowen (N. Y.) 526.

*Texas*. *Cassin v. Zavalla County*, 70 Tex. 419, 8 S. W. 97.

**Legality of special meetings.** Statutory requirements as to calling special meeting to be observed, to validate meeting.

*Indiana*. *White v. Fleming*, 114 Ind. 560, 16 N. E. 487.

*Iowa*. *Board of Supervisors v. Horton*, 75 Iowa 271, 39 N. W. 394; *Scott v. Union County*, 63 Iowa 583, 19 N. W. 667.

*Kansas*. *Scott v. Paulen*, 15 Kan. 162.

*Michigan*. *Donough v. Dewey*, 82 Mich. 309, 46 N. W. 782.

*New York*. *Whiteside v. People*, 26 Wend. (N. Y.) 634; *People v. Walker*, 23 Barb. (N. Y.) 304.

*United States*. *Goedgen v. Supervisors*, 2 Biss. C. C. (U. S.) 328.

Failure of member of a board of fire and police commissioners to attend a meeting after reasonable notice thereof does not render the proceedings void. *State v. Bemis*, 45 Neb. 724, 64 N. W. 348.

When notice of special meeting is required, and what business may be transacted thereat. *Sommerkamp v. Kelly*, 8 Idaho 712, 71 Pac. 147.

In one case the law provided that a special meeting of the council may be called by the mayor or any three members of the council and at such called meeting any business may be considered; if all of the members attend such special meeting failure to give notice is immaterial. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

Notice of special meeting may be delivered to council members personally by the mayor or through the mail. *Renter v. Meacham Contr. Co., Ky.* (1911), 136 S. W. 1028.

Where the law provides that "the mayor may by proclamation convene the common council in special session," the manner of calling the same is left to the mayor's discretion, and it may be by posting a notice on the city hall door and serving each member with a copy. *Cushing v. Hartwig*, 138 Mo. App. 114, 120 S. W. 109.

A meeting of a council not on a regular meeting day, held without



A special meeting will be held invalid unless all of the members have been duly notified as required by law or unless they were all, or at least all who were not properly notified, present at the meeting.<sup>8</sup>

notice, is valid if all the members are present and consent to the holding of the meeting. *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453.

The journal entry of the city clerk reciting that a call for a special meeting was made, its object and the action taken thereon by the council, was a sufficient requirement with the law. *Gale v. Moscow*, 15 Idaho 332, 97 Pac. 828.

8. *Illinois*. *Thomas v. Citizens Horse R. R. Co.*, 104 Ill. 462; *Schofield v. Tampico*, 98 Ill. App. 324, 326; *People v. Frost*, 32 Ill. App. 242; *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. 197.

*Indiana*. *Tombaugh v. Grogg*, 146 Ind. 99, 44 N. E. 994.

*Iowa*. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

*Kentucky*. *Shugars v. Hamilton*, 122 Ky. 606, 29 Ky. L. Rep. 127, 92 S. W. 564.

*Michigan*. *Beaver Creek v. Hastings*, 52 Mich. 528, 18 N. W. 250.

*Minnesota*. *Lord v. Annoka*, 36 Minn. 176, 30 N. W. 550; *State v. Smith*, 22 Minn. 218.

*Missouri*. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 577, 31 S. W. 946.

*Nebraska*. *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

*New York*. *People v. Batchelor*, 28 Barb. (N. Y.) 310.

A special meeting where some of the members have not been

notified, and were not present is not valid, nor is any action taken thereat. *Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995.

Where a member is absent from the state and his exact whereabouts are unknown and it is therefore impracticable to give him actual notice, such notice is not necessary. *State ex rel. v. Kirk*, 46 Conn. 395; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075.

**Method of Calling.** Under a charter providing that the mayor call special meetings of the council "by causing notice to be left at the usual residence of each member" personal notice to the members will be sufficient. *Russell v. Wellington*, 157 Mass. 100, 31 N. E. 630.

Under a charter, authorizing special meetings to be convened by the mayor in pursuance of law, and that the mayor shall call special sessions by proclamation, which shall be published as may be provided by ordinance, it was held that in the absence of such ordinance, special meetings of the council called by proclamation of the mayor, and all acts of the council at such meetings were illegal. *Ferry v. Ridge*, 56 Mo. App. 615.

As to sufficiency of notice under particular provision, see *Caniff v. New York*, 4 E. D. Smith (N. Y.) 430.

Where the charter is silent as to stating the purpose of the special meetings, the judicial decisions present some conflict as to such requirement.<sup>9</sup> If the charter requires

In one case the charter authorized special meetings on notice to each member served personally or left at his usual place of abode. Here it was held that where each member of the council had actual notice of a special meeting and of certain adjournments of it, and of their purpose, and in good faith met and transacted public business, the meeting and ordinance passed thereat were valid though no written notice of such meeting and adjournments were served. *Young v. Rushsylvania*, 8 Ohio Cir. Ct. Rep. 75.

**Presumptions as to regularity of meeting.**

*Indiana.* Stoddard v. Johnson, 75 Ind. 20; Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495; Torr v. Corcoran, 115 Ind. 188, 17 N. E. 286; Jussen v. Commissioners, 95 Ind. 567.

*Kansas.* State v. Francis, 26 Kan. 724; Downing v. Miltonvale, 36 Kan. 740, 14 Pac. 281.

*Kentucky.* Elliott v. Louisville, 101 Ky. 262, 40 S. W. 690.

*Michigan.* Board of Supervisors v. Judges, 106 Mich. 166, 64 N. W. 42; Newaygo County Mfg. Co. v. Echinaw, 81 Mich. 416, 45 N. W. 1010; Harding v. Bader, 75 Mich. 316, 321, 42 N. W. 492.

*Minnesota.* Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235.

*Mississippi.* Tierney v. Brown, 65 Miss. 563, 5 So. 104, 7 Am. St. Rep. 679.

*New Jersey.* State (Staats) v. Washington, 45 N. J. L. 318, 2 Am. & Eng. Corp. Cas. 39.

An ordinance passed at an illegal special meeting may be upheld when it has been long acted on as valid. *Dollar Saving Bank v. Ridge*, 79 Mo. App. 26.

Proceedings of a special meeting, held valid though one member was absent and had not been notified. *State v. Bowers*, 26 Ohio Cir. Ct. 326, affirmed in 70 Ohio 423, 72 N. E. 1155.

The meeting of a common council and its adjournments are presumed to be regular in the absence of an affirmative showing to the contrary. *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945.

9. *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786; *Whitney v. New Haven*, 58 Conn. 450, 461, 20 Atl. 666; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

The purpose of the meeting must be stated. *Bergen v. Clarkson*, 1 Halst. (6 N. J. L.) 352; *Smith v. Tobener*, 32 Mo. App. 601.

If, from the language of the call for a special meeting, it may be fairly inferred that the passage of the ordinance in question was contemplated, the requirement as to notice is sufficiently complied with. *Elliott v. Newark*, 8 Del. Ch. 64, 68 Atl. 400.

that the notice shall specifically state the business for which the body has been convened, the special meeting may only act on subjects so stated.<sup>10</sup>

### § 602. Power to adjourn meetings.

In the absence of provision to the contrary, when a regular or stated or called corporate meeting is once duly organized at the time and place appointed it pos-

10. *St. Louis v. Withaus*, 90 Mo. 646, 3 S. W. 395, 16 Mo. App. 247; *McQuiddy v. Vineyard*, 60 Mo. App. 610; *Forry v. Ridge*, 56 Mo. App. 615; *Allen v. Rogers*, 20 Mo. App. 290; *Mills v. San Antonio* (Tex. Civ. App. 1901), 65 S. W. 1121.

If the notice specifies a particular purpose, any act of the meeting "wholly beside the special purpose of the meeting as stated" will be held void. *Bergen v. Clarkson*, 1 Halst. (6 N. J. L.) 352, citing *Rex v. Liverpool*, 2 Burr. 735.

No vote shall be reconsidered or rescinded at a special meeting, unless there be present as large a number of aldermen as were present when such vote was taken. 1 Starr & Curtis Ill. Stat., p. 685, par. 43.

Business that may be transacted. *Richardson v. Omaha*, 74 Neb. 297, 104 N. W. 172.

May pass ordinance then pending and previously twice read and referred to committee. *Nat. Life Ins. Co. v. Omaha*, 73 Neb. 41, 102 N. W. 73, citing, *Kearney County v. Kent*, 5 Neb. 227; *Greely v. Hamman*, 17 Colo. 30, 28 Pac. 460; *Fuller v. Groton*, 77 Mass. 340.

Business that may be transacted. *Sommercamp v. Kelly*, 8 Idaho 712, 71 Pac. 147.

In Michigan the notice of a special meeting of the council of a village need not be in writing or state the object of the meeting, nor is it required to be made a matter of record. *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717.

Proof of service of notice under particular statute. *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717.

Under a charter provision requiring that, at a special meeting of the council, the objects of the meeting shall be submitted in writing and the submission entered upon the journal by the clerk, reference to a specific ordinance pending on its purport, is unnecessary, where "the consideration of ordinances" has been set out as one of the objects of the meeting. Under the above charter provision a statement of the objects of the meeting in the call is unnecessary. *National Life Ins. Co. v. Omaha*, 73 Neb. 41, 102 S. W. 73.

sesses the incidental power to adjourn to a future time.<sup>11</sup> And after such adjournment no legal action can be taken by the meeting.<sup>12</sup> In one case at a regular meeting a quorum was not present and all business, including an ordinance returned vetoed, was laid over until the next regular meeting to be held at 9 a. m. the next day. At 9:35 a. m. the president declared the meeting adjourned for want of a quorum. At 10 a. m. all the members of the council met except the president and passed the ordinance over the mayor's veto. The action was held void, as no quorum had appeared within the hour named and hence the meeting expired by its limitation of adjournment.<sup>13</sup>

An adjournment beyond the time permitted by law is unauthorized. Thus in one case the charter provided

11. *California.* Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

*Florida.* Stockton v. Powell, 29 Fla. 1, 10 So. 688.

*Illinois.* People ex rel. v. Fairbury, 51 Ill. 149.

*Maine.* Chamberlain v. Dover, 13 Me. 466.

*Massachusetts.* Attorney General v. Simonds, 111 Mass. 256, 260.

*Michigan.* Donough v. Dewey, 82 Mich. 309, 312, 46 N. W. 782; Hubbard v. Winsor, 15 Mich. 146, 152.

*Minnesota.* State ex rel. v. Smith, 22 Minn. 218, 223.

*Missouri.* Rackliffe v. Duncan, 130 Mo. App. 695, 700, 108 S. W. 1110, citing McQuillin, Mun. Ord., § 111.

*Nebraska.* Ex parte Wolf, 14 Neb. 24, 14 N. W. 660, 6 Am. & Eng. Corp. Cas. 153.

*New Hampshire.* Kimball v. Marshall, 44 N. H. 465, 468.

*New Jersey.* Stiles v. Lambert-

ville, 73 N. J. L. 90, 62 A. 288.

*New York.* In re Newland Ave., 38 N. Y. St. Rep. 796; People v. Rochester, 5 Lans. (N. Y.) 142, 147.

*Pennsylvania.* Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

Law may limit power of adjournment. Grimmett v. Askew, 48 Ark. 151, 2 S. W. 707.

But if a special meeting is not called in the manner prescribed by statute, any adjourned meeting thereof is illegal and void. Kleimenhagen v. Dixon, 122 Wis. 526, 100 N. W. 826.

The legality of an adjourned meeting by less than a quorum cannot be questioned by the courts where all the members of the council were present and participated in the adjourned meeting. Nash Co. v. Bluffs, 174 Fed. 182.

12. Kimball v. Lamprey, 19 N. H. 215.

13. Fitzgerald v. Pawtucket St. Ry. Co., 24 R. I. 201, 52 Atl. 887.

in case of a double legislative board, that one board shall not adjourn without the concurrence of the other board for a longer period than twenty-four hours, and that if they cannot agree on adjournment, the mayor shall adjourn them to a day, not beyond the regular time of meeting. In event of disagreement the mayor adjourned one board beyond the time allowed. It was held that the adjournment was a nullity and that both boards were left in session with the right to meet next day.<sup>14</sup>

Where the adjournment is legal the members are bound to take notice of the time to which the meeting has been adjourned.<sup>15</sup> Provision is usually made in the organic law of the corporation for the place of meeting. Where the law provides that the meeting shall be at such place as shall be appointed by the voters from time to time the meetings may be adjourned to a different place within the discretion of those present.<sup>16</sup> The adjournment may only be proved by the record.<sup>17</sup>

14. *Tillman v. Otter*, 93 Ky. 600, 29 L. R. A. 110, 20 S. W. 1036.

15. "The law holds members of deliberative bodies, parties attending courts of justice and public meetings, bound to take notice of the time of adjournment, and to be present at the time and place of adjournment without special notice." Per Bell, C. J., in *Kimball v. Marshall*, 44 N. H. 465, 468; *Nugent v. Wrinn*, 44 Conn. 273; *People v. Batchelor*, 22 N. Y. 128, 146; *London v. Vanacre*, 12 Mod. 272; *Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404.

16. *Goodel v. Baker*, 8 Cowen (N. Y.) 286; *People ex rel. v. Martin*, 5 N. Y. 22.

17. *Taylor v. Henry*, 2 Pick. (Mass.) 397; *State v. Jersey City*, 25 N. J. L. 309.

**Penalty for non-attendance.** An ordinance providing that a member absenting himself from any of the meetings of the council may be fined, etc. which fine may be collected by suit, etc. is not authorized under a statute which provides that a minority of the aldermen may "compel the attendance of absentees under such penalties as may be prescribed by ordinance," the city council having neither express or implied power to impose a penalty on an alderman for mere failure to attend a council meeting. *Earlville v. Radley*, 237 Ill. 242, 245, 86 N. E. 624.

### § 603. Business that may be transacted at adjourned meetings.

If a regular meeting is adjourned, any business which would have been proper for the body to consider at that meeting may be considered and acted upon at the adjourned meeting, but if it is a special or called meeting which is adjourned nothing can be done at such adjourned meeting unless it could have been considered and acted upon at the special or called meeting.<sup>18</sup> An adjourned meeting of either a regular or stated or special or called meeting is but a continuation of the same meeting.<sup>19</sup>

The point is well illustrated in a New Jersey case where the charter provided that no ordinance should be enacted unless the same had been introduced at a previous meet-

18. *Ex parte Wolf*, 14 Neb. 24, 29, 30, 14 N. W. 660, 6 Am. & Eng. Corp. Cas. 153; *Hickok v. Shelburne*, 41 Vt. 409; *New Orleans v. Brooks*, 36 La. Ann. 641.

A school district, after having chosen one person as prudential committee at its annual meeting and adjourned, may choose additional members of such committee at the adjourned meeting. *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99, 105.

19. *Iowa*. *Carter v. McFarland*, 75 Iowa 196, 39 N. W. 268.

*Indiana*. *State v. Vanosdal*, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; *State v. Harrison*, 67 Ind. 71; *Sackett v. State*, 74 Ind. 486.

*Louisiana*. In re opening Robin Street, 1 La. Ann. 412; *New Orleans v. Brooks*, 36 La. Ann. 641.

*Maine*. *Cassidy v. Bangor*, 61 Me. 434, 441.

*Michigan*. *Hubbard v. Winsor*, 15 Mich. 146.

*Mississippi*. *Tierney v. Brown*,

65 Miss. 563, 5 So. 104, 7 Am. St. Rep. 679.

*Missouri*. *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249.

*Nebraska*. *Magneau v. Freemont*, 30 Neb. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

*New Jersey*. *Hudson County v. State*, 24 N. J. L. 718; *Stiles v. Lambertville*, 73 N. J. L. 90, 62 Atl. 288; *State v. Washington*, 45 N. J. L. 318, 2 Am. & Eng. Corp. Cas. 39.

*New York*. *Smith v. Law*, 21 N. Y. 296; *People v. Martin*, 5 N. Y. 32.

*Vermont*. *Warner v. Mower*, 11 Vt. 385.

But when the council, though in form adjourning to a certain specified time, in reality intended to call a special meeting on the date named, as evidenced by all the facts in the case, such meeting will be held to be a special and not an adjourned meeting. *State v. Ross*, 46 Wash. 28, 89 Pac. 158.

ing. An ordinance was passed, but it did not appear from the record whether the meeting at which it was passed was an adjourned meeting of a special or regular meeting. "If it was the former," remarked the court, "the adjournment was but a continuance of the special meeting, and the ordinance being introduced at such special meeting was never legally before the council. This may seem like a very technical exception; but bringing it to the test of the governing rules in these cases, it is nevertheless well taken. For it does not appear upon the face of the record, or in any other way, that the provision of the charter was complied with; it does not appear that the power has been strictly pursued."<sup>20</sup>

#### § 604. Council as continuous body.

Under the usual municipal organization the members are elected to the council annually or biennially, and thus a part of the membership (one-third or one-half) is renewed at such times. Sometimes the entire legislative body is renewed at municipal elections. Frequently the question is presented whether the council is a continuous body or whether each new council is to be considered a distinct legislative organization.

20. *State v. Jersey City*, 25 N. J. L. 309, 312; *State (Staates) v. Washington*, 44 N. J. L. 605, 45 N. J. L. 318, 2 Am. & Eng. Corp. Cas. 39; *Hudson County v. State*, 24 N. J. L. 718.

Ordinance passed at an adjourned meeting held valid. *Cut-comp v. Utt*, 60 Iowa 156, 14 N. W. 214.

Ordinance passed at an adjourned meeting under a suspension of the rules is valid, although at the prior regular meeting a proposition to suspend the rules respecting this ordinance was

voted down. *Madden v. Smeltz*, 2 Ohio Cir. Ct. 168, 173.

Presumption as to presence of quorum. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

Where an ordinance is passed at a meeting which in form appeared to be an adjourned meeting of the one at which the ordinance was introduced, but in reality such meeting was intended, to be a special meeting, the ordinance will not be held void as having been passed at the same meeting at which introduced. *State v. Ross*, 46 Wash. 28, 89 Pac. 158.

The rule as applied to the English Parliament, the Congress of the United States, and the various state legislatures (which bodies are composed of two houses), is that the newly constituted organization is incapable of carrying on proceedings initiated and not completed by its predecessor, but all proceedings are required to be commenced *de novo*. This rule was early applied in New York in a case where the common council consisted of two boards.<sup>21</sup> It obtained also in Canada until changed by statute.<sup>22</sup>

In an Iowa case a contrary rule has been announced. In this case the charter required that ordinances of a general or permanent nature should be fully and distinctly read on three different days. One-half of the council was renewed every year. The bill in question received two readings before the election and a third reading after a new mayor and half of the council were officially installed. The ordinance was held valid. The court declined to "regard the analogy between a state legislature and a city council sufficiently strong to be of controlling importance. If there be a sense in which there is a succession of city councils (which we do not determine) there is such immediate succession as to involve a substantial continuity when taken with the fact that one-half of the aldermen hold over; and we have no doubt that a continuity was contemplated by the legisla-

21. *Wetmore v. Story*, 22 Barb. (N. Y.) 414, 3 Abb. Pr. (N. Y.) 262; *Beekman's Case*, 11 Abb. Pr. (N. Y.) 164.

22. *Township of East Nissouri v. Horseman*, 16 Up. Can. Q. B., p. 583; *The Canadian Atlantic R. W. Co. v. Ottawa*, 8 Ontario Rep. 183, 12 Ontario App. Rep. 234, 12 Sup. Ct. of Can. 365.

**Council is continuous body.** Because of the delay and inconvenience of the old rule, it is now expressly provided by statute in

Canada that, "a municipal council shall be deemed and considered as always continuing and existing, notwithstanding any annual or other election of the members composing the same, and, after any such election and the organization of the council for the current year, may take up and carry on to completion all proceedings commenced but not completed prior thereto." *Biggar, Mun. Manual of Canada*, p. 338, § 327.



ture. We believe that the proper conduct of municipal affairs demands it.”<sup>23</sup>

**§ 605. Action of legislative body consisting of two branches.**

Municipal legislative departments are frequently composed of two houses or branches. Certain corporate acts are required to be done in joint session, but most of the legislative functions are performed by each house or branch, acting separately as in the case of the state legis-

23. Council declared to be continuous body. “All that the statute prescribes is three readings. The position that all the readings should be before the same persons is based upon an inference drawn from the supposed object of the provision. \* \* \* We cannot think that it was intended that all unfinished business should be dropped at each council election and taken up again entirely anew, if at all.” *McGraw v. Whitson*, 69 Iowa 348, 28 N. W. 632, 34 Alb. Law Journ. 59. No authorities at all are cited or referred to.

The Iowa case was followed by a *nisi prius* judge in a case wherein the facts, in substance, were the same. *Smith v. Columbus & L. S. Ry. Co.*, 8 Ohio N. P. Rep. 1. The case distinguishes *Wetmore v. Story*, 22 Barb. (N. Y.) 414 and *Beekman's case*, 11 Abb. Pr. (N. Y.) 164; approves *Tiedeman, Mun. Corp.*, § 148, and dissents from *Horr and Bemis, Municipal Police Ordinances*, § 47.

The council was treated as a continuous body touching the consideration of a mayor's veto in *People v. Buffalo*, 108 N. Y. S. 331, 123 App. Div. 141.

The power of the council over streets is a continuing one, and bids for work thereon presented to the council may be acted on by that body notwithstanding an election had intervened in which one-half of the members thereof were to be voted for. *State (Booth) v. Bayonne*, 56 N. J. L. 268, 28 Atl. 381.

A common council of a city is a continuous body. *People v. Schenectady*, 120 N. Y. S. 621, 136 App. Div. 127.

A council may complete the unfinished business of a preceding council, including the final reading and passage of ordinances having had their first reading by the previous council. *Renter v. Meacham Contr. Co., Ky.* (1911), 136 S. W. 1028, following *McGraw v. Whitson*, 69 Ia. 348, 28 N. W. 632.

latures. A concurrence of both branches in the enactment is required.<sup>24</sup>

In a New York case, where the charter vested the legislative powers in a board of aldermen and board of assistant aldermen, who together formed the common council, it was held to have adopted by implication, so far as applicable, the universally recognized principle of legislative bodies consisting of two independent branches. Therefore, a resolution adopted by the board of assistants in one year, cannot be concurred in by the board of aldermen in another year so as to make it, without consulting the existing body of assistants, an ordinance of the common council, and thus a corporate act of the city. The court held that it must, as in the case of unfinished business in other legislative bodies, be taken up *de novo*.<sup>25</sup>

In a Massachusetts case, an ordinance provided that a certain officer should be chosen by concurrent vote of both branches of the city council and that either branch might first make the selection. One branch chose A and reported to the other, which declined to concur. Afterwards the latter branch at an adjourned meeting, elected A. At the next meeting of the first branch notice was received that the other branch had voted to non-concur

24. *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081.

**Concurring action.** Where a charter provides that the board of aldermen and the common council "in their joint capacity shall be denominated the city council," and requires all petitions to be first acted on by the mayor and aldermen, and gives the right of appeal to "any person aggrieved by any proceeding of the mayor and aldermen or of the city council," it will be held that the charter does not contemplate action by

the board of aldermen and council in joint convention. Here the action was first passed by the aldermen and then by the common council in concurrence, and not in joint convention. It was held legal. *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554, 17 Am. & Eng. Corp. Cas. 604.

25. *Wetmore v. Story*, 22 Barb. (N. Y.) 414, 489-495, 3 Abb. Pr. (N. Y.) 262; *Beekman's Case*, 11 Abb. Pr. (N. Y.) 164.

Compare cases cited in previous section.

in A's election; also notice that at the adjourned meeting A had been elected by the second branch. The first branch then nonconcurred in A's election and elected B and so notified the other branch which concurred. B was declared duly elected. The vote to elect A at the adjourned meeting was held not a vote in concurrence with the other branch, but a new election.<sup>26</sup>

§ 606. Rules for conducting business — parliamentary law.

Where the charter or law applicable does not prescribe rules for the government of the proceedings of councils, municipal boards, etc., the body is at liberty to determine its own rules of proceedings from time to time as occasion may require.<sup>27</sup> Oftentimes the organic law provides that the council or representative body may adopt

26. *Saunders v. Lawrence*, 141 Mass. 380, 384, 5 N. E. 840.

Action where two branches exist. Where a mayor is authorized at any time to convene two boards or branches of aldermen and councilmen in general session for legislation, an ordinance may not be passed by one board in general session and by the other at a special session called by him. *Glazier v. Newport*, 132 Ky. 181, 116 S. W. 262.

In a city wherein the legislative power is vested in two houses subject to the veto power of the mayor, one house cannot by resolution make a valid contract. It may conduct an investigation into the subject of municipal taxation and appoint a committee for that purpose but has no authority to provide for a committee clerk or special attorney for such purpose to be paid by the city without an ordinance

having been legally enacted therefor. Implied power if any, to appoint a committee clerk or special attorney must be exercised in accordance with the provisions of the statute and charter. *State ex rel. v. Dierkes*, 214 Mo. 578, 588, 113 S. W. 1077.

27. *Illinois. Carbondale v. Wade*, 106 Ill. App. 654, 662.

*Indiana. Landes v. State*, 160 Ind. 479, 67 N. E. 189.

*Missouri. Sedalia v. Gilsonite Const. Co.*, 109 Mo. App. 197, 88 S. W. 1014.

*Nebraska. State v. Dunn*, 76 Neb. 155, 107 N. W. 236.

A county board may make reasonable rules for its government. *Higgins v. Curtis*, 39 Kan. 283, 18 Pac. 207.

In the absence of proof to the contrary any action taken will be presumed to have been in conformity therewith. *Masters v. McHolland*, 12 Kan. 17, 24.

its own rules of action.<sup>28</sup> However, mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members have agreed to the particular measure.<sup>29</sup> So the council may abolish, modify or waive its own rules.<sup>30</sup> But, of course, it cannot disregard mandatory charter provisions.<sup>31</sup> Hence,

28. *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429; *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259; 1 Starr & Curtis Ill. Stat., p. 684, par. 36; *Boyd v. Chicago, B. & Q. R. R. Co.*, 103 Ill. App. 199.

Ordinarily, rules adopted by council are binding upon that body. *State v. Hoyt*, 2 Ore. 246.

29. *Mann v. Lemars*, 109 Iowa 244, 251, 80 N. W. 327; *State v. Archibald*, 5 N. D. 359, 66 N. W. 234; *Madden v. Smeltz*, 2 Ohio Cir. Ct. Rep. 168; *Hutcheson v. Storie* (Tex. Civ. App., 1898), 48 S. W. 785, reversed in 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848, 71 Am. St. Rep. 884.

30. *Colorado. Greely v. Hamman*, 17 Colo. 30, 28 Pac. 460.

*Iowa. Chariton v. Holliday*, 60 Iowa 391, 14 N. W. 775.

*Massachusetts. Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977; *Holt v. Somerville*, 127 Mass. 408, 411; *Bennett v. New Bedford*, 110 Mass. 433, 437.

*Missouri. Sedalia v. Scott*, 104 Mo. App. 595, 609, 78 S. W. 276.

*New York. Ex parte Mayor of Albany*, 23 Wend. (N. Y.) 280.

*Pennsylvania. Commonwealth v. Lancaster*, 5 Watts (Pa.) 152.

31. See §§ which follow.

Council rules can be amended only on notice, when. *Armatage v.*

*Fisher*, 74 Hun (N. Y.) 167, 26 N. Y. S. 364.

A rule of order of the council providing that the general rules of parliamentary law are to be considered the rules of the council, held that the council itself is the judge of what are general rules and what rules are applicable to the business before that body. The court cannot declare as a matter of law that it was incumbent upon the council to read the ordinance three times before final passage or that a single reading was sufficient in absence of statutory or charter provision on the subject. *Landes v. State*, 160 Ind. 479, 67 N. E. 189.

Board held bound by its own rules. *Hicks v. Long Branch Comrs.*, 69 N. J. L. 300, 55 Atl. 250.

When the president of a board declines to put a motion properly made, any member thereof may put it and announce the result. *Hicks v. Long Branch Comrs.*, 69 N. J. L. 300, 54 Atl. 568, 55 Atl. 250.

The standing rules of a commission adopted under authority of the statutes creating the commission, are binding on the commission and acts in disregard of them are illegal. *Hicks v. Long Branch Commission*, 69 N. J. L. 300, 55 Atl. 250.

where an ordinance is enacted in compliance with the charter it will not be held void because in its passage one of the parliamentary rules of the council was violated.<sup>32</sup>

Where a parliamentary question has been determined by the council, ordinarily the courts will not reverse such ruling.<sup>33</sup> The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law where the facts of such action can be gathered from the record; however, it cannot be established from testimony of members as to their understanding of what was intended to be done.<sup>34</sup>

In reference to the action of county boards the Supreme Court of Wisconsin has timely observed: "It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body."<sup>35</sup> In like manner liberal construction is often applied to the action of councils in enacting ordinances.<sup>36</sup>

32. *McGraw v. Whitson*, 69 Iowa 348, 28 N. W. 632.

"There are few, if any, branches of the law on which there is less to be found in the way of direct adjudications than on the law governing representative or deliberative bodies which is usually denominated parliamentary law. Most of the decisions which have touched upon questions of this kind have been made in recent years." Note to *State ex rel. v. Kiichli*, 19 L. R. A. 779.

33. *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

Review of decisions of councils permitted. *Swann v. Cumberland*, 8 Gill (Md.) 150; *Walsh v. Johnston*, 18 R. I. 88, 25 Atl. 849.

Presumption in favor of legal action. *State v. Smith*, 22 Minn. 218.

Council decision of discretionary matters is conclusive. *Schank v. New York*, 10 Hun (N. Y.) 124; affirmed 69 N. Y. 444; *Indianapolis v. Consumer's Gas Trust Co.*, 140 Ind. 246, 39 N. E. 943.

34. *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184, 30 Am. & Eng. Corp. Cas. 453.

35. *Hark v. Gladwell*, 49 Wis. 172, 177, 5 N. W. 323; *Wisconsin Central R. R. v. Ashland County*, 81 Wis. 1, 50 N. W. 937.

36. "The mayor and councilmen, or other officers of a municipal corporation, are not usually selected because of their learning

§ 607. Form of corporate action — mandatory and directory provisions.

The general rule that, where the charter or law under which the corporation is organized specifies a particular manner in which the given action is to be taken, such manner must be substantially followed, is specially applicable to the proceedings of the council or governing legislative body.<sup>37</sup> But where no particular method of action is pointed out, as, for example, where the law confers the power and enjoins the duty upon the council to fix the salaries of certain officers, any form of procedure which the council may adopt in expressing its determination as to what the salaries shall be, will be a substantial compliance with the charter, if such action is made to appear in the record of the proceedings in some

in the law, their observance of its forms, or their instruction in fine distinctions. If their action is to be subjected to rigid criticism much of it done in good faith, and in the spirit of their defined authority, would be avoided." *Woodruff v. Stewart*, 63 Ala. 206, 215.

"It is not to be expected that the technical rules of parliamentary law, which are enforced for the convenience in governing and controlling legislative bodies, should be vigorously applied to the proceedings of a village council." *Medden v. Smeltz*, 2 Ohio Cir. Ct. 168, 174.

Where the charter is silent as to the mode of voting in the organization of the council, any mode not forbidden by law which insures to each member the right to vote and by which the will of the majority can be fairly ascertained may be adopted. The vote may be either by yeas and nays

on motion or by ballot. It is essential to a valid election that all who are present and are constituent members of the elective body shall have an opportunity to vote. They all in this respect stand upon equal footing. *State ex rel. v. Green*, 37 Ohio St. 227, 230.

Compare § 607 *post*, and cases therein.

The validity of the action of a legislative body will be upheld by the language of the proceedings of the meetings if it is fairly susceptible of such construction. *Bryant v. Pittsfield*, 199 Mass. 530, 85 N. E. 739.

37. Where the law requires certain acts to be done by ordinance they may only be done by ordinance and not by mere resolution, order or motion. *State ex rel. v. Green*, 37 Ohio St. 227, 230.

This subject is fully considered in ch. 15 *post*.

written permanent form, as by the record in the minutes of an oral motion on the vote thereon.<sup>38</sup>

The council generally acts by vote. In the absence of express provision, the vote may be given in any form which clearly expresses the will of the members. It may be by ballot, by resolution, by the adoption of a verbal motion or in any other manner.<sup>39</sup> "A vote is but the expression of the will of a voter; and whether the formula to give expression to such law be a ballot or *viva voce* the result is the same; either is a vote."<sup>40</sup>

Departure from the form prescribed for corporate action, as in the passage of an ordinance, will not affect the validity of such action unless the charter or governing law makes such formality vital,<sup>41</sup> as by declaring the action or ordinance void unless the form prescribed be followed.<sup>42</sup>

It is to be observed that some courts seem disposed to hold municipal legislative bodies to a stricter course of

38. *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503.

39. *State ex rel. v. Barbour*, 53 Conn. 76, 81, 55 Am. Rep. 65.

40. *Per Davies, J.*, in *People ex rel. v. Pease*, 27 N. Y. 45, 57, quoted with approval in *State ex rel. v. Green*, 37 Ohio St. 227, 230.

Where charter requires certain officers to be appointed by the council, this may be done by ballot, instead of a vote by ayes and nays. *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

Charter provided the election should be by ballot if called for. Ballot was requested but refused, and a committee appointed who reported names, which were declared accepted. Election held illegal. *State v. Harris*, 52 Vt. 216.

Method of balloting, secret or *viva voce*, in particular case.

*Goodloe v. Fox*, 96 Ky. 627, 29 S. W. 433.

Provisions as to election of officers by ballot sometimes only apply to principal officers. *Williams v. Gloucester*, 148 Mass. 256, 19 N. E. 348.

Invalid election of officers by council cannot be ratified. *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

Election by resolution held valid. *Low v. Pilotage Com'rs*, R. M. Charl't. (Ga.) 302.

41. *Rockville v. Merchant*, 60 Mo. App. 365, 371; *St. Louis v. Stern*, 3 Mo. App. 48; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202; *Trustees, etc. v. Erie*, 31 Pa. St. 515.

42. *St. Louis v. Foster*, 52 Mo. 513.

regularity in proceedings, in so far as charter provisions are involved, than state legislatures. This undoubtedly grows out of the fact that a municipal corporation has no inherent right of legislation, but acts wholly under delegated authority and can exercise no power which is not in express terms or fair implication conferred upon it.<sup>43</sup> The policy of the law is to concede power to the legislature and ordinarily to recognize that which has been done as rightly done, but the general principle applied to the municipal corporation is that it must make its powers apparent and show regularity, and a fair and substantial compliance with all mandatory legal provision.<sup>44</sup> Therefore, the validity of any given corporate act, as the passage of an ordinance or resolution or the making of a contract for an improvement, depends upon the fact that it was regularly passed by the council.<sup>45</sup>

#### § 608. Taking yeas and nays.

Charters often provide that whenever a vote is taken on certain propositions, as in the passage of an ordinance, by-law, resolution, or contract for work, the yeas and nays shall be taken and recorded.<sup>46</sup> As heretofore

43. *Thomson v. Lee County*, 3 Wall. (U. S.) 327, 330, 18 L. Ed. 177; *Clark v. Davenport*, 14 Iowa 494; *Nichol v. Mayor*, 9 Humph. (Tenn.) 252; *Altoona v. Bowman*, 171 Pa. St. 307, 37 Wkly. Notes Cas. 102, 33, Atl. 187.

44. *Bloom v. Xenia*, 32 Ohio St. 461, 465.

45. *Blanchard v. Bissell*, 11 Ohio St. 96, 101.

Compare prior section (§ 607), and cases cited therein.

46. *Illinois*. *McLean v. East St. Louis*, 222 Ill. 510, 78 N. E. 815; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Ryan v. Lynch*, 68 Ill. 160; *Supervisors, etc. v. People*, 25 Ill. 181; *Hackman v. Staunton*, 42 Ill. App. 409;

*Belknap v. Miller*, 52 Ill. App. 617; *Knight v. Thompsonville*, 74 Ill. App. 550, 555; *Chicago v. Fraser*, 60 Ill. App. 404, 409.

*Indiana*. *Martindale v. Palmer*, 52 Ind. 411, 413; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

*Iowa*. *Indianola v. Jones*, 29 Iowa 282.

*Massachusetts*. *Morrison v. Lawrence*, 98 Mass. 219.

*New York*. *In re Carlton St.*, 16 Hun (N. Y.) 497, 499.

*Ohio*. *State ex rel v. Green*, 37 Ohio St. 227, 230; *Sullivan v. Pausch*, 5 Ohio C. C. 196.

General law not applicable to cities with special charters. *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577.



mentioned, frequently the word "shall" as employed in a law is held to be directory merely, the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination.<sup>47</sup> This doctrine has been applied to the charter requirement that votes on certain propositions shall be taken by yeas and nays.<sup>48</sup> Where the law declares the action void if the yeas and nays are not taken and recorded, the provision is always construed as mandatory. However, notwithstanding the absence of such declaration, the weight of the judicial view appears to be that such provision is mandatory and cannot be disregarded.<sup>49</sup>

47. §§ 380, 381 *ante*; *St. Louis v. Foster*, 52 Mo. 513, per Wagner, J.; *In re Mount Morris Square*, 2 Hill (N. Y.) 14, 20; *Elmdorf v. New York*, 25 Wend. (N. Y.) 693.

The effect of mere departure from the prescribed form is elaborately considered in *Pac. Ry. Co. v. Governor*, 23 Mo. 353.

48. *Striker v. Kelly*, 7 Hill (N. Y.) 9, 24, affirmed 2 Denio (N. Y.) 323; *Belknap v. Miller*, 52 Ill. App. 617.

See *Barr v. Auburn*, 89 Ill. 361.

But in Iowa where the statute required a roll call and a record of the yeas and nays where the minutes of the meeting showed who was present and recited that the roll was called and that the vote was unanimous in the affirmative, it was held to be a sufficient compliance with the statute. *Marion Water Co. v. Marion*, 121 Iowa 306, 96 N. W. 883; *Bennett v. Emmetsburgh*, 138 Ia. 67, 115 N. W. 582 to the same effect.

So in Ohio under a statute requiring the vote on an ordinance to be taken by yeas and nays and

recorded on the journal, where the records of both branches give the names of those in attendance, and show that the measure was adopted by a number shown to be in attendance, the statute is sufficiently complied with. *Blair v. Cary*, 24 Ohio Circ. Rep. 560.

49. *Arkansas*. *Cutler v. Russellville*, 40 Ark. 105, 4 Am. & Eng. Corp. Cas. 414.

*Colorado*. *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; *Tracey v. People*, 6 Colo. 151, 4 Am. & Eng. Corp. Cas. 373; *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399.

*Illinois*. *Rich v. Chicago*, 59 Ill. 286; *Hackman v. Staunton*, 42 Ill. App. 409; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571.

*Indiana*. *Logansport v. Crockett*, 64 Ind. 319; *New Albany Gas Light, etc. Co. v. Crumbo*, 10 Ind. App. 360, 37 N. E. 1062.

*Iowa*. *Olin v. Meyers*, 55 Iowa 209, 7 N. W. 509; *Cook v. Independence*, 133 Iowa 582, 110 N. W. 1029.

*Nebraska*. *In re Ryan*, 79 Neb.

A separate vote by yeas and nays for each specific corporate act is required usually. Hence it has been held that ordinances cannot be legally passed by voting for two or more at one and the same time.<sup>50</sup> Although the charter provides in general terms that the vote in all cases shall be taken by ayes and noes, and every vote shall be entered at large on the journal, it has been held that it does not apply to a vote upon a motion to adjourn.<sup>51</sup> So the vote on the passage of a resolution, to carry out the provisions of a prior ordinance, need not be by yeas and nays, as required in case of an ordinance.<sup>51a</sup>

### § 609. Reasons for requiring yeas and nays.

Two principal reasons may be suggested in favor of the requirement under consideration: *First*, the most important is to obtain a definite and accurate record of the corporate action in order to determine whether all of the mandatory provisions of the charter have been observed. Only in this way may it be ascertained whether

414, 112 N. W. 599; *Payne v. Ryan*, 79 Neb. 414, 112 N. W. 599.

*New York.* In re South Market St., 76 Hun (N. Y.) 85, 27 N. Y. S. 843.

*North Dakota.* O'Neill v. Tyler, 2 N. D. 47, 53 N. W. 434.

*New Jersey.* Heicks v. Long Branch Commission, 69 N. J. L. 300, 55 Atl. 250.

*United States.* Coffin v. Portland, 43 Fed. 411.

50. *Illinois.* Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

*Iowa.* Markham v. Anamosa, 122 Iowa 689, 98 N. W. 493.

*Ohio.* Sullivan v. Pausch, 5 Ohio Cir. Ct. 196; *Campbell v. Cincinnati*, 49 Ohio St. 463, 31 N. E. 606.

*Pennsylvania.* Daflinger v. Pitts-

burgh, etc. T. Co., 31 Pitts. L. J. (Pa.) 37.

*Wisconsin.* Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52.

Where five members of a council, composed of eight, are present, and voted in favor of the action, as record shows, it is immaterial that the nays do not appear to have been called. *Bayard v. Baker*, 76 Iowa 220, 40 N. W. 818.

51. *Green Bay v. Brauns*, 50 Wis. 204, 208, 6 N. W. 503.

51a. *Grimmell v. Des Moines*, 57 Iowa 144, 10 N. W. 330.

Restricted to certain class of ordinances. *Mackin v. Wilson*, 20 Ky. L. Rep. 218, 45 S. W. 663; *Argus Co. v. Albany*, 55 N. Y. 495, 7 Lans. (N. Y.) 264.

the particular act is legal or illegal. *Second*, another purpose is to make the members of the body feel the responsibility of their action and to compel each member to bear his share in the responsibility by making a permanent written record of his action which should not be afterwards open to dispute.<sup>52</sup> It is well known that men acting in a body, especially when under cover of corporate privilege, will often do what no one of them would be willing to do if acting alone and upon his individual responsibility; and they will sometimes say "aye," or permit a matter to pass *sub silentio* when they would not venture to record their names in favor of the measure.<sup>53</sup> The inhabitants of the municipality are, as of right, entitled to know clearly the act and vote of every member, of their agents and servants, on every proposition relating to public duties, and a record of such acts and votes should be plainly made in a permanent form so that every inhabitant may have definite information.<sup>54</sup>

### § 610. Reading bills on three different days.

Many charters prescribe that certain ordinances and resolutions shall be read a specified number of times be-

52. Per Cooley, J., in *Steckert v. East Saginaw*, 22 Mich. 104, 107, 108; *Logansport v. Dykeman*, 116 Ind. 15, 18, 17 N. E. 587; *Brophy v. Hyatt*, 10 Colo. 223, 226, 15 Pac. 399.

53. Reason for requiring yeas and nays. "To guard against such evils, and protect the citizens against the impositions of unnecessary burdens it was provided \* \* \* that the ayes and noes should be called and published whenever a vote should be taken on any proposed improvement involving a tax or assessment on the citizens. The language is imperative—the ayes and noes shall

be called. When the particular mode in which the corporation is to act is thus specifically declared by its charter, I think it can only act in the prescribed form. The contrary doctrine wants the sanction of legal authority and is fraught with the most dangerous consequences. It would place corporations above the law, and there is reason to fear that they would soon become an intolerable nuisance." Dissenting opinion of Bronson, J., in *Striker v. Kelly*, 7 Hill (N. Y.) 9, 29.

54. As to sufficiency of record of yeas and nays, see ch. 14 *post*.

fore passage; the most usual provision being that they shall be read on three different days.<sup>55</sup> Some charters permit the reading a specified number of times to be dispensed with on a two-thirds or three-fourths vote of the body.<sup>56</sup> In the absence of charter provision, council rules often require certain bills and resolutions to receive two or three several readings on different days before final passage.<sup>57</sup> The method of dispensing with the number of readings as prescribed by vote or suspension of rules is stated in another section.<sup>58</sup> Charter or statutory pro-

55. *Florida*. *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429.

*Iowa*. *Bayard v. Baker*, 76 Ia. 220, 40 N. W. 818; *Cutcomp v. Utt*, 60 Ia. 156, 14 N. W. 214; *Horner v. Rowley*, 51 Ia. 620, 2 N. W. 436.

*Kentucky*. *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

*Nebraska*. *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860.

*Ohio*. *Elyria Gas, etc. Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335; *Campbell v. Cincinnati*, 49 Ohio St. 463, 31 N. E. 606; *Bloom v. Xenia*, 32 Ohio St. 461; *Cincinnati v. Johnson*, 17 Ohio Cir. Ct. 291, 9 Ohio Cir. Dec. 736; *Kerlin Bros. Co. v. Toledo*, 20 Ohio Cir. Ct. 603, 11 Ohio Dec. 56; *Smith v. Columbus L. & S. Ry. Co.*, 8 Ohio (N. P.) 1.

Two readings sufficient. *Zeller v. Central R. R. Co.*, 84 Md. 304, 35 Atl. 932; *South Jersey Telegraph Co. v. Woodbury*, 73 N. J. L. 276, 63 Atl. 4.

The third reading of the ordinance may be by merely reading its title. *Anderson v. Camden*, 58 N. J. L. 515, 33 Atl. 846.

A constitutional provision requiring bills in the legislature shall be read in each house on

three different days, does not apply to proceedings in municipal bodies. *Cumberland Telephone & Telegraph Co. v. Huckman*, 33 Ky. L. Rep. 730, 111 S. W. 311; *Cumberland Telephone & Telegraph Co. v. Davidson*, 33 Ky. L. Rep. 730, 111 S. W. 311.

**Printing bill.** Some laws also require that ordinances be printed for the use of the members before they can be considered by the council. *Heallock v. Lebanon*, 215 Pa. 1, 64 Atl. 362.

56. *Bloom v. Xenia*, 32 Ohio St. 461; *Griffin v. Messenger*, 114 Iowa 99, 86 N. W. 219.

Under a charter provision that by a two-thirds vote an ordinance may be put upon its final passage at the same meeting when presented, an ordinance is not legally adopted notwithstanding it received a two-thirds vote, where no motion was made to put it upon its final passage. *South Jersey Telegraph Co. v. Woodbury*, 73 N. J. L. 276, 63 Atl. 4.

57. *Holt v. Somerville*, 127 Mass. 408; *Bennett v. New Bedford*, 110 Mass. 433.

58. § 597 *ante*; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

visions of this character are generally held to be mandatory, and hence, failure to observe them invalidates the action.<sup>59</sup>

Where under the charter the council is a continuous body, an ordinance which had been read on two separate days before the regular election for councilmen may, after the annual organization of the council following such election, be read a third time and passed. The court was of the opinion that the unfinished business of the council should not be regarded as dropped with each council election.<sup>60</sup>

Contrary to the current of authority, the rule of the Supreme Court of Missouri is that, a charter provision that "all bills shall be read three times before their final passage," is directory merely. The court said: "It is to be observed that the above section does not declare a sentence of nullity against a bill which is not read

59. *California*. Herzo v. San Francisco, 33 Cal. 134; Weill v. Kenfield, 54 Cal. 111.

*Illinois*. Ryan v. Lynch, 68 Ill. 160.

*Indiana*. Swindell v. State, 143 Ind. 153, 42 N. E. 528.

*Iowa*. Griffin v. Messenger, 114 Iowa 99, 86 N. W. 219.

*New Jersey*. State (Gregory) v. Jersey City, 34 N. J. L. 429.

*Ohio*. Campbell v. Cincinnati, 49 Ohio St. 463, 31 N. E. 606; Thatcher v. Toledo, 19 Ohio Cir. Ct. Rep. 311; Bloom v. Xenia, 32 Ohio St. 461.

Where the record reads: "Ordinances No. ——— concerning butchers and meat wagons passed to a third reading and put on its final passage," with a recital that all the members voted yes, it is

sufficiently shown that the ordinance was read a third time before final passage. Rockville v. Merchant, 60 Mo. App. 365, 371.

Failure of record as to presenting and reading of ordinance. Chicago Tel. Co. v. N. W. Tel. Co., 199 Ill. 324, 65 N. E. 329.

60. McGraw v. Whitson, 69 Iowa 348, 28 N. W. 632, 34 Alb. L. J. 59; Smith v. Columbus L. & S. Ry. Co., 8 Ohio (N. P.) 1.

The new council can take up the proceedings where they were left off by the old council, as the body is continuous. Booth v. Bayonne, 56 N. J. L. 268, 28 Atl. 381.

See § 604 *ante*.

*Contra*. Paterson & R. R. Co. v. Paterson, 74 N. J. L. 738, 68 Atl. 76.

three times before its final passage.”<sup>61</sup> It has been held that a charter provision requiring all ordinances or resolutions of “a permanent or general nature” to be read on three distinct days, does not apply to a resolution awarding a contract for the improvement of a street,<sup>62</sup> nor to the preliminary resolution declaring a proposed improvement necessary.<sup>63</sup> It is clear that the same bill or ordinance must be read the number of times prescribed. Thus, where a charter requires certain ordinances, as those providing for improvements which are to be paid for by special taxation, to be published between their second and third readings, a material amendment (as, for example, changing the character of the proposed improvement or streets to be improved) cannot be made

61. “There are authorities to the contrary but we shall adhere to our own decisions.” Per Sherwood, J., *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Rockville v. Merchant*, 60 Mo. App. 365.

Similar views were held in *State ex rel. v. Mead*, 71 Mo. 266, and *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98; *Barton v. Pittsburgh*, 4 Brewster (Pa.) 373.

**Presumption.** It has been held in Illinois that it is not necessary that the journal should show that the bill was read the number of times prescribed by the constitution, for this will be presumed to have been done unless the journal affirmatively shows that it was not done. Here the constitution was silent as to the entry of reading on the journal. The court said: “It is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not

to be held to afford evidence that the act was not done. In such case we must presume it was done, unless the journal affirmatively shows that it was not done.” Per Caton, C. J., in *Supervisors of Schuyler Co. v. People ex rel.*, 25 Ill. 181, 184; *Chicago Tel. Co. v. N. W. Tel. Co.*, 100 Ill. App. 57.

The above Illinois decisions relate to the reading of bills in the State legislature; the requirement does not apply to municipal council in that State.

62. *Cincinnati v. Bickett*, 26 Ohio St. 49, 55.

Where the code provided that no law or ordinance presented for adoption, amendment or repeal should be acted on till the next regular meeting, this was held not to apply to a resolution. *Ryan v. Tuscaloosa*, 155 Ala. 479, 46 So. 638.

63. *Upington v. Oviatt*, 24 Ohio St. 232, 240.

after the second reading, without the notice required.<sup>64</sup> But an immaterial change in the title or body of the ordinance will not invalidate it.<sup>65</sup>

In New Jersey it has been ruled that "where the title of an ordinance discloses its object, the reading of the title is equivalent to reading the ordinance."<sup>66</sup>

### § 611. Ratification of void acts.

Irregular and void acts may be ratified or confirmed at a subsequent meeting.<sup>67</sup> Thus, where the action in allowing a claim is invalid because of a lack of a majority vote as required by law, it may be ratified at a subsequent meeting by resolution confirming such previous action.<sup>68</sup> So a town may at a legal town meeting ratify acts of its selectmen in borrowing money and giving a note therefor in behalf of the town.<sup>69</sup>

In a New Hampshire case, the court expressed a doubt whether, where selectmen appoint one to an office without legal authority, a subsequent vote of the town to ratify their act is valid, but if valid the court held that

64. The court said that the charter contemplates that all amendments should be made, and the proposed ordinance perfected on the second reading; and that the notice given between the second and third reading will inform parties interested of the precise character of the improvements intended. *State (Doyle) v. Newark*, 30 N. J. L. 303, 305.

65. *State (Staates) v. Washington*, 44 N. J. L. 605.

66. *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 342.

67. *Act of park commissioners. State ex rel. v. Hennepin County Dist. Court*, 33 Minn. 235, 22 N.

W. 625, 7 Am. & Eng. Corp. Cas. 206.

A school district, at a legal meeting, may ratify and confirm proceedings of previous meetings which were not strictly legal. *Jordan v. School District*, 38 Me. 164.

*Marion Water Co. v. Marion*, 121 Iowa 306, 316, 322, 96 N. W. 883.

68. *Curtis v. Gowan*, 34 Ill. App. 516. *Wheat v. Van Tine*, 149 Mich. 314, 14 Det. Leg. News 430, 112 N. W. 933.

69. "A ratification after the act is as potent as authority before the act." *Brown v. Winterport*, 79 Me. 305, 311, 9 Atl. 844.

it must only operate as a new appointment by the town and the officer, after such vote, must qualify.<sup>70</sup>

In one case where all of the members of the council were not notified of a special meeting and certain corporate action was taken, it was held that, if at the next regular meeting the minutes of the special meeting are read and approved, this will be equivalent to a ratification of what was done at that meeting.<sup>71</sup> However, it has been held that the mere approval of the minutes of such meeting is not a complete ratification of the acts of the special meeting, but only an approval of the correctness of such meeting.<sup>72</sup> Where a particular action is confirmed by resolution, which resolution is afterwards duly rescinded, confirmation of the former action may take place legally only upon giving notice as required by law prior to the taking of the original action.<sup>73</sup>

There can be no legal confirmation or ratification of *ultra vires* acts,<sup>74</sup> nor of acts under a void law. So, where the charter conferred exclusive power upon the council to execute the particular act, and it was performed by an officer, such act can not be legally ratified.<sup>75</sup> Where the charter prescribes a method of doing the act, this mode must be observed in any act of ratification.

70. *Johnston v. Wilson*, 2 N. H. 202.

71. A municipal corporation may ratify all contracts not *ultra vires*. *Shawneetown v. Baker*, 85 Ill. 563.

This is another case in which notice of a special meeting was not given to all the members of the council but the irregularity was cured by the subsequent ratification by the mayor and council of the proceedings had at such meeting. *Territory v. De Wolfe*, 13 Okla. 454, 74 Pac. 98.

72. *Mills v. San Antonio* (Tex. Civ. App., 1901), 65 S. W. 1121.

73. *State v. Jersey City*, 27 N. J. L. 536.

74. *Shawneetown v. Baker*, 85 Ill. 563; *Maupin v. Franklin Co.*, 67 Mo. 327; *Johnson v. School District*, 67 Mo. 319; *McKissick v. Mt. Pleasant Tp.*, 48 Mo. App. 416; *Kolkmeier v. Jefferson City*, 75 Mo. App. 678, 683; *Unionville v. Martin*, 95 Mo. App. 28, 37, 68 S. W. 605.

75. *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Baltimore v. Horn*, 26 Md. 194, 204; *Lester v. Baltimore*, 29 Md. 415; *Horn v. Baltimore*, 30 Md. 218, 222.



Thus, where the act could only be done by ordinance, the ratification must be by ordinance.<sup>76</sup>

### § 612. Reconsideration—general powers respecting.

Unless restrained by charter or statute applicable, the legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until by final vote or act, accepted as such by the body, a conclusion is reached, and it is the result only which is done.<sup>77</sup> An ordinance after having been finally enacted over the veto of the mayor cannot be reconsidered.<sup>78</sup> So, after the mayor's veto of an ordinance is returned to the legislative body and the veto sustained, a subsequent reconsideration and passage of the ordinance over the veto is

76. *Unionville v. Martin*, 95 Mo. App. 28, 37, 68 S. W. 605.

77. *Whitney v. Van Buskirk*, 40 N. J. L. 463, 467; *Stiles v. Lambertville*, 73 N. J. L. 90, 62 Atl. 288.

Right to reconsider exists. "All deliberative assemblies, during their sessions, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done." *State v. Foster*, 7 N. J. L. 101, 107.

"The right of reconsidering lost measures inheres in every body possessing legislative powers." *Jersey City v. State*, 30 N. J. L. 521, 529.

May reconsider at subsequent meeting vote by which a measure was lost and pass the ordinance. *People ex rel. v. Rochester*, 5 Lans. (N. Y.) 11.

"All bodies, possessing a judicial capacity, have the competency to consult, resolve and reconsider, and they are not bound by their conclusions until such conclusions have been promulgated by their authority." *State v. Crosley*, 36 N. J. L. 425, 428.

Freeholders to lay out a public road may reconsider a vote by which they have determined a matter before them, and alter their determination if done before they separate. *State v. Justice*, 24 N. J. L. 413.

County court may legally revoke an order. *Dey v. Lee*, 4 Jones L. (N. C.) 238; *Tucker v. Iredell Co. Justices*, 13 Iredell (N. C.) 434.

78. *Ashton v. Rochester*, 60 Hun (N. Y.) 372, 14 N. Y. S. 855, affirmed 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

unauthorized. In such case the ordinance cannot be passed on a second reconsideration after the charter test had decided it in the negative.<sup>79</sup>

The reconsideration must be in accordance with the provisions of the charter, and the rules of procedure, if any, governing the body. In the absence of evidence to the contrary, ordinarily courts will presume that the action was properly had.<sup>80</sup> A resolution authorizing a corporate act which requires a majority vote of all of the members of the body can be rescinded only by a like

79. The charter provided that when an ordinance is returned vetoed the council "shall proceed to reconsider it. If after such reconsideration two-thirds" vote for it notwithstanding the veto it shall become a law, but upon failure to receive such vote the ordinance shall be lost. *Sank v. Philadelphia*, 4 Brews. (Pa.) 133, 8 Phila. Rep. 117; *People v. Rochester*, 5 Lans. (N. Y.) 11.

80. *Sank v. Philadelphia*, *supra*. As to consideration of mayor's veto, see ch. 16 *post*.

**Illustrative cases on reconsideration.** A matter was reconsidered at a subsequent meeting. It did not appear that there was a rule of the council authorizing such action. It was presumed that there was such a rule. *Red v. Augusta*, 25 Ga. 386, 390.

**Who to move reconsideration.** *People v. Rochester*, 5 Lans. (N. Y.) 11.

In absence of proof to the contrary a reconsideration of the action of a county board taken on a former day of the same session, on any matter properly before it,

will be presumed to have been done in conformity with its rules and regulations. *Higgins v. Curtis*, 39 Kan. 283, 18 Pac. 207; *Masters v. McHolland*, 12 Kan. 17, 24.

A resolution passed by the requisite vote, after veto declaring that the ordinance stand, the objections of the mayor to the contrary notwithstanding, is a sufficient reconsideration, though the resolution does not expressly declare that the body reconsiders the matter. *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

Notice of reconsideration sometimes required. *Atlanta Ry. & Power Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481, 39 S. E. 12.

"When a bill is put upon its final passage in the board and fails to pass, and a motion is made to reconsider, the vote upon such motion shall not be acted upon before the expiration of twenty-four hours after adjournment." Charter San Francisco, art. II, ch. 1, § 12; Stat. and Amend. to Codes, Cal. (1899), p. 245.

vote.<sup>81</sup> So, where the charter requires a two-thirds vote to adopt a resolution, the same vote is necessary on reconsideration.<sup>82</sup>

### § 613. Power to rescind prior acts.

In accordance with the doctrine of the last section, the legislative body of the corporation, or any board or department thereof, possesses the unquestioned power to rescind prior acts and votes at any time thereafter until the act or vote is complete, provided vested rights are not violated, and such rescission is in conformity to the law applicable and the rules and regulations adopted for the government of the body.<sup>83</sup> Thus, where a town has voted to raise a tax, but nothing has been done thereunder, the town has the power at a meeting legally warned for that purpose to rescind or reconsider the

81. *Naegely v. Saginaw*, 101 Mich. 532, 60 N. W. 46; *Stockdale v. School Dist.*, 47 Mich. 226, 10 N. W. 349. See *City Sewerage U. Co. v. Davis*, 8 Phila. (Pa.) 625; *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503.

82. *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184.

In Illinois, by statute no vote shall be reconsidered or rescinded at a special meeting unless there be present as large a number as were present when such vote was taken. 1 Starr and Curtis Ill. Stat., p. 685, par 43.

83. *Connecticut*. *Staples v. Bridgeport*, 75 Conn. 509, 54 Atl. 194.

*Indiana*. *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501.

*Massachusetts*. *Damon v. Granby*, 2 Pick. 345; *Nelson v. Milford*,

7 Pick. 18; *Withington v. Harvard*, 8 Cush. 66; *Hunneman v. Grafton*, 10 Met. 454; *Hall v. Holden*, 116 Mass. 172.

*New Hampshire*. *Sawyer v. M. & K. R. R. Co.*, 62 N. H. 135, 153, 154, 13 Am. St. Rep. 541; *Mitchell v. Brown*, 18 N. H. 315.

*New York*. *Curnen v. Mayor, etc.*, 79 N. Y. 511.

*Ohio*. *Adkins v. Toledo*, 27 Ohio Cir. Ct. Rep. 417.

**Rescinding prior acts.** Vote to aid a railroad may be rescinded where nothing had been done under the vote. *Estey v. Starr*, 56 Vt. 690.

Prior act to pay over money may be rescinded. *Dey v. Lee*, 4 Jones L. (N. C.) 238; *Tucker v. Iredell Co. Justices*, 13 Iredell (N. C.) 434.

vote.<sup>84</sup> But where a town has in town meeting, by vote, ratified the act of the selectmen in borrowing money and giving a note therefor in behalf of the town, such vote of ratification fully completes the act, and, therefore, the town cannot at a subsequent meeting rescind such ratification so as to affect the validity of the contract.<sup>85</sup>

### § 614. Rescinding votes in electing and appointing officers.

A consideration of the acts of councils in electing and appointing or confirming the appointment or nominations of officers and agents will fully illustrate the difference between a completed and incompleted act or vote in regard to the right of reconsideration and rescission. Thus where the resignation of an officer was presented to the mayor to take effect at a future day, which resignation was accepted by the mayor and forwarded to the council

84. *Stoddard v. Gilman*, 22 Vt. 568, 573, where it is said: "A vote to raise money for town purposes is a mere declaration, or resolution, on the part of the town alone, and not in the nature of a grant, or contract between the town and an individual. \* \* \* So long as this rests in mere resolution, and has not been acted upon, we think the town must have the power to rescind or reconsider it. Until something has been done under the vote, the town alone are interested in it, and may alter their resolve at their own pleasure."

So a school district having voted to raise moneys for erecting a school house may afterwards and before the same are assessed, rescind such vote at their discretion. *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131.

85. *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844.

**Right to rescind prior acts.** Whether a vote of a town to discontinue a town way can be reconsidered after rights of third parties have intervened, *quaere*. *Bigelow v. Hillman*, 37 Me. 52, 58.

An order of a county court regularly made which vacates an old road and establishes a new public highway in lieu thereof cannot at a subsequent term be vacated so that the old road will be re-established, without the notice, petition and review prescribed by law. *Reiff v. Conner*, 10 Ark. 241.

After having rejected all bids, a council may reconsider and award a contract to one of the original bidders without readvertising. *State ex rel. v. Cleveland*, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357.

which also accepted it, it was held that the act of acceptance of the resignation was complete and the council alone had no power to reconsider the action by which that body accepted the resignation. And in such case where the mayor, in accordance with charter provisions, nominated a successor and sent the nomination to the council which confirmed the appointment, the council cannot at a subsequent meeting reconsider the vote by which the nomination was confirmed.<sup>86</sup>

So a council made by the charter the sole judge of the election and qualification of its own members, having once investigated and seated a member, cannot at a subsequent meeting order a second investigation.<sup>87</sup>

86. *Rescinding vote denied.* "It seems to me that the matter was put beyond recall or reach by the board by a reconsideration of their action at the meeting (subsequent) \* \* \*. It is clear that while the matter of acceptance was under consideration by the board of councilmen, it was the right of that body to reconsider its vote, and vote as often as it saw fit upon the question, up to the time when, by a conclusive vote, accepted as such by itself a determination was reached. *State v. Foster*, 2 Halst. 101; *State v. Justice*, 24 N. J. L. (4 Zab.) 413; *State v. Crosley*, 36 N. J. L. (7 Vroom) 425. Such final determination may be evidenced by a public promulgation of the result, or by subsequent action inconsistent with the purpose of further review." *Whitney v. Van Buskirk*, 40 N. J. L. 463, 467, distinguishing *Biddle v. Willard*, 10 Ind. 63; *People v. Wetherell*, 14 Mich. 48 and *Nove v. Bradley*, 3 Blackf. (Ind.) 158.

The confirmation of the mayor's appointee, as the charter requires,

exhausts its powers in the matter, and hence it cannot reconsider its action therein. *State v. Wadbams*, 64 Minn. 318, 67 N. W. 64.

An election of an officer at a legal meeting cannot be reconsidered at an adjourned meeting and another elected in his stead. *State v. Phillips*, 79 Me. 506, 11 Atl. 447; *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456.

87. *Kendall v. Camden*, 47 N. J. L. 64.

The power expires with the council which admits the member. *Doran v. De Long*, 48 Mich. 552.

Where a council having canvassed the returns and determined and declared the result in an election of mayor its power in this respect is exhausted and it has no right to make another canvass at a subsequent day with a different result. *Hadley v. Albany*, 33 N. Y. 603; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72, 78.

As to power of council to revoke at a subsequent meeting a license granted, see *Lantz v. Hightstown*, 46 N. J. L. 102.

In a Connecticut case the municipal charter provided that the common council which consisted of two branches, in joint convention, should appoint a prosecuting attorney, but gave no direction as to the mode. The convention possessed no power of removal. Upon assembling the convention voted "to proceed to ballot for a prosecuting attorney." A ballot was taken and C had a clear majority of all of the votes cast and of the whole convention, and the result was announced by the presiding officer. A resolution was offered declaring C elected, which was lost. Two resolutions were then offered, one declaring the ballot void by reason of errors in it (which it was found did not exist), and the other declaring B "elected and appointed prosecuting attorney;" both of which resolutions were passed. Here it was held that C had been duly elected, that no resolution declaring him elected was necessary, and that the latter resolutions declaring the ballot void and B elected were of no effect.<sup>88</sup>

In a Massachusetts case the aldermen and councilmen, thirty-one in number, met in convention to appoint a city clerk. On ballot being taken, B received seventeen votes, C fourteen and F one, but there were thirty-two votes cast. The convention unanimously declared the ballot void, and on a second ballot being taken, upon unanimous

88. *State ex rel. v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, in which there is a dissenting opinion by Park, C. J.

In an election by a joint convention of two bodies, consisting of fifty-six members, of which fifty-five were present, on two ballots M. had twenty-eight votes, but was not declared elected, the chair ruling that a majority of the whole number was necessary, in which ruling he was sustained by the convention. Another ballot was taken and F received thirty-one

votes and was declared elected, which election the court sustained. *Miller v. Foster*, 7 N. J. L. 101, decision criticised in *State ex rel. v. Barbour*, 53 Conn. 76, 90, 55 Am. Rep. 65, on the ground that "it confounds legislative proceedings with executive acts and applies the rules regulating the former to the latter, while such rules are applicable only to a limited extent. It assumes that the convention had power to undo as well as to do, to remove as well as to appoint."

consent, C received seventeen votes and B fourteen, and thereupon C was declared duly elected. The court, in holding C's election legal, said: "It was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceedings had as irregular and invalid, and to vote anew."<sup>89</sup>

### § 615. Committees.

Provision is usually made in the organic law of the corporation, or by ordinance or other regulations, duly adopted in pursuance thereof, for the creation and constitution of committees, to assist the legislative body in

89. *Baker v. Cushman*, 127 Mass. 105, 106.

The mayor's decision as to the result of a vote, if acquiesced in is conclusive and where the body proceeds to a second election the one receiving the requisite vote is elected. There can be no reconsideration. *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387.

A greater number of votes cast than the body is entitled to cast will generally invalidate the election. *Labourdette v. New Orleans*, 2 La. Ann. 527.

A resolution appointing a librarian by a county board of supervisors may be reconsidered and another person appointed. *People ex rel. v. Mills*, 32 Hun (N. Y.) 459.

Where a blank vote was cast on the election of an officer which the tellers did not count and without which ballot it appeared that the two candidates had an equal number of votes, and the mayor thereupon gave a casting vote which he was authorized to

do in case of a tie, for one of the candidates and declared him elected after which a resolution was passed that the mayor's declaration was erroneous and that the convention would proceed to the election by a ye or nay vote. This action was taken against the ruling of the mayor and by a ye and nay vote the candidate was elected. Held, legal; that as the blank vote should be counted there was no tie and the mayor could not give a casting vote; therefore, there was no election and that it was not necessary that the convention should formally rescind its vote to elect by ballot, but that the legal effect of the resolution to elect by a ye and nay vote was to rescind that vote, which was all that was necessary. *State ex rel. v. Chapman*, 44 Conn. 595.

As to passage of resolution over mayor's veto in election of officer, under particular circumstances, see *Caswell v. Bay City*, 99 Mich 417, 58 N. W. 331.

the performance of its proper duties, as in the collection of facts and information which are generally embodied in reports. This method of performing portions of the public business is not forbidden and has often been sanctioned by judicial decisions.<sup>90</sup> The rule appears to be well established that certain municipal duties may be performed by agents or committees.<sup>91</sup> Thus, the council may refer applications for the location or alteration of streets to a committee to examine into the matter and report to the council.<sup>92</sup> So, where the council is the sole judge of the election of its own members, upon the institution of a contest, a committee may be appointed to take testimony and report to the council.<sup>93</sup>

90. *Commonwealth v. Pittsburgh*, 14 Pa. St. 177, 184.

Towns may appoint committees for special purposes. *Keyes v. Westford*, 17 Pick. (Mass.) 273.

91. *United States. Bullitt County v. Washer*, 130 U. S. 142.

*Connecticut. Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666.

*Florida. Holland v. State*, 23 Fla. 123, 1 So. 521.

*Illinois. Gillett v. Logan County*, 67 Ill. 256; *Alton v. Mulledy*, 21 Ill. 76.

*Indiana. Duncan v. Lawrence County Comrs.*, 101 Ind. 403.

*Iowa. Stewart v. Council Bluffs*, 58 Iowa 642, 12 N. W. 718.

*Massachusetts. Damon v. Granby*, 2 Pick. (Mass.) 345.

*New Jersey. Burlington v. Denison*, 42 N. J. L. 165.

*New York. Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Kamrath v. Albany*, 53 Hun (N. Y.) 206, 6 N. Y. S. 54; *Edwards v. Watertown*, 24 Hun (N. Y.) 426.

Delegating power to committee. The doctrine forbidding

the delegation of powers upon the part of the council or other governing legislative body to boards, officers or other persons is fully stated elsewhere (§§ 382 to 387 *ante*).

Council cannot delegate to a committee the power to contract, as for supply of gas. *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159, 30 N. W. 450; *Anderson v. Equitable Gas Light Co.*, 12 Daly (N. Y.) 462.

92. *Preble v. Portland*, 45 Me. 241.

Council committee may build a sewer, when. *Dorey v. Boston*, 146 Mass. 336, 339, 15 N. E. 897.

Make sewer assessments by third person. *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

Committee to purchase school lands. *Parkey v. Concord*, 71 N. H. 468, 52 Atl. 1095.

93. *Powers of committees. Salmon v. Haynes*, 50 N. J. L. 97, 100, 11 Atl. 151, holding committee may employ stenographer.

When representations of council committee will bind the city,



A council may authorize the mayor and the chairman of a committee on streets and alleys to make in its behalf a contract for doing public work and afterwards confirm such report.<sup>94</sup> When the council ratifies the act of the committee in due and legal form it becomes the act of the council.<sup>95</sup>

see *Sharp v. New York*, 40 Barb. (N. Y.) 256, 25 How. Pr. (N. Y.) 389.

Under a charter which vested legislative powers in a board of aldermen and a board of councilmen and provided that each board shall judge of the eligibility of its own members and punish or expel a member, a committee of aldermen authorized by a resolution of the general council (which was the designation of the two boards) to investigate charges of corruption of its members is illegal. *Commonwealth v. Hillenbrand*, 96 Ky. 407, 29 S. W. 287.

As to power of committee to issue attachments for witnesses, see *Briggs v. Matsell*, 2 Abb. Pr. (N. Y.) 156; *In re Dunn*, 9 Mo. App. 255.

Under a charter authorizing the issuance of an attachment against the witnesses for refusing to answer any proper question those only are proper questions which are pertinent to the investigation and come within the subject referred to and which relates to the matters of the power of the common council to inquire about. *Van Tine v. Nims*, 3 Abb. Pr. (N. Y.) 39.

Power to commit a witness who refused to attend when duly summoned or to be sworn or affirmed or to answer after being sworn, extends no authority to the com-

mitment of witness who refused to produce books and accounts. *People v. Van Tassel*, 135 N. Y. 638, 32 N. E. 646.

See § 616 *post*.

94. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

95. *Milford School Town v. Powner*, 126 Ind. 528, 26 N. E. 484; *Railroad Co. v. Marion Co.*, 36 Mo. 294; *Salmon v. Haynes*, 50 N. J. L. 97, 11 Atl. 151.

**Acceptance of committee report.** A favorable report of a committee appointed by a city council to inspect waterworks and recommend action as to their acceptance, when approved by the board will constitute a complete acceptance, and the failure to pass an ordinance of acceptance subsequently proposed will not defeat it. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

Where, after waterworks contracted for by a city have been completed, the city council appoints a committee to inspect them and the committee recommends their acceptance, the receiving of water from the works and the payment of an installment due under the contract amounts to a ratification of the report of the committee and an acceptance of the works by the city. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

The committee, being the sole creature of the council, is subject at all times to the complete control of the council. Any committee may be reduced or enlarged in membership, or its powers entirely revoked, if not inconsistent with the charter or rules governing the body. Some charters require certain things to be done by committees, as that the engrossment of bills or ordinances shall be under the supervision of a committee which shall report that the bill is truly engrossed, and that no bill shall be considered for final passage unless the same has been reported upon by a committee.<sup>96</sup>

The rules as to quorums and majorities heretofore given respecting councils and boards usually apply to the proceedings of committees.<sup>97</sup> The major part of a committee appointed by a town for a particular purpose is necessary to constitute a quorum, and the act of a majority of a quorum is the act of the committee.<sup>98</sup> However, this rule is only important in so far as the report of the committee is concerned. The final or corporate act is within the discretion of the body creating the committee.

### § 616. Power to commit for contempt.

Some charters confer the power upon the legislative body of the corporation to compel the attendance of witnesses and the production of books, papers, etc., relating to any subject under consideration and in which the interests of the city are involved, and also the power to punish for contempt any witnesses who refuse to produce books, papers, etc., material to a pending inquiry and

**Procedure — validity of act.**  
Right to modify a contract by majority. *Burge v. Rockwell City*, 120 Iowa 495, 94 N. W. 1103.

96. Charter of the City of St. Louis, art. III, §§ 13, 15; The Municipal Code of St. Louis (1901), pp. 205, 206.

97. §§ 592-599 *ante*.

98. *Damon v. Granby*, 2 Pick. (Mass.) 345; *State (Van Vorst) v. Jersey City*, 27 N. J. L. 493.

Majority of selectmen of a town may act in laying out a road. *Jones v. Andover*, 9 Pick. (Mass.) 146; *Crommett v. Pearson*, 18 Me. 344.

properly called for in a *subpoena duces tecum*.<sup>99</sup> It has been held that such subpoena cannot be disobeyed on the ground that the books or papers demanded are the private property of the witness.<sup>1</sup>

The Supreme Judicial Court of Massachusetts has declared unconstitutional a statute conferring power to imprison and punish for contempt without right of appeal or trial by jury. In that case a witness had been legally summoned to testify before a special committee of a council. The committee had been duly appointed with full power to investigate and report relative to certain charges of corruption against its members. The witness declined to answer a question, material and growing out of the investigation, and was committed for contempt by order of the council. The court held that the council was neither a legislature nor a court, nor was it vested with any judicial functions whatever in the sense in which that term is used in the law.<sup>2</sup>

Under particular circumstances other courts have denied the power of city councils to punish for contempt.<sup>3</sup>

Without express authority of Parliament, under the common law of England, a town or city council had no power to commit for contempt.<sup>4</sup>

99. Charter of the City of St. Louis, art. III, § 31; The Mun. Code of St. Louis (1901), p. 225; *Ib.*, pp. 706, 707, §§ 1314-1317; Revised Code of St. Louis (Woerner, 1907), p. 342, §§ 1392-1395.

1. The subpoena need not contain the declaration that the books or papers demanded are material to the investigation. In *re Dunn*, 9 Mo. App. 225, holding power to be constitutional.

2. *Whitcomb's case*, 120 Mass. 118.

3. In *re Hammel*, 9 R. I. 248; *People v. Van Tassel*, 19 N. Y. S. 643, affirming 17 N. Y. S. 938.

4. Grant on Corporations, 84-86; *Barter v. Commonwealth*, 3 Pa. 253.

Power to punish for contempt. In *re Conrades*, 185 Mo. 411, 85 S. W. 160, the power is discussed as it is conferred by the St. Louis charter, and the right to punish for contempt was denied under a resolution of the house of delegates in that particular case, reversing 112 Mo. App. 21. These cases consider the authorities fully.

A witness is not in contempt for refusal to answer the question of an investigating committee of the city council where the ques-

tion may tend to incriminate him. In re Van Tine, 12 How. Pr. (N. Y.) 507.

A council committee has no power to inquire of a witness before it in reference to his own acts with individuals other than the officers whose action is under investigation. In re Van Tine, 12 How. Pr. (N. Y.) 507.

A witness cannot be committed for declining to answer question not pertinent to the investigation. In re Cole, 16 Misc. Rep. 134, 38 N. Y. S. 955.

A committee of a city council, appointed to investigate bribery

in the passage of an ordinance granting privileges to a certain corporation where a witness has testified that in his professional capacity he had purchased for his client certain stock of such corporation from the estate of one who had been a member of the council when the ordinance was passed, have no authority to compel an answer as to the identity of such client and the witness' refusal to answer is not contempt. In re Simon's case, 16 Pa. Co. Ct. Rep. 352.

See n. 93 to § 615 *ante*.

## CHAPTER 14.

## MUNICIPAL RECORDS.

Sec.	Sec.
617. The keeping of records necessary.	625. Same subject—imperfect record—rights of creditors.
618. Who to keep municipal records.	626. Amendment of record.
619. Sufficiency of record—presumptions.	627. Method of amending.
620. Same—taking yeas and nays.	628. Court may order amendment— <i>mandamus</i> .
621. Municipal records as evidence.	629. Amendment after lapse of time—estoppel— <i>Ex post facto</i> .
622. Reports of committees and officers as evidence.	630. Inspection of municipal record.
623. Parol evidence to prove record.	631. Enforcing delivery of municipal records.
624. Parol evidence to show omissions.	

## § 617. The keeping of records necessary.

Usually the law requires municipal corporations to make written records of their transactions and proceedings. The keeping of such records by the legislative or governing body is generally required in express terms.<sup>5</sup> Oftentimes boards and departments connected with the

5. 1 Starr & Curtis Ill. Stat., p. 685, par. 41.

Records usually necessary. Proceedings of council meeting cannot be left in parol; they must be recorded. Moser v. White, 29 Mich. 59.

Provision that all by-laws, resolutions and ordinances are to be recorded in a book kept for that purpose, held with respect to the particular book in which the rec-

ord shall be made, directory merely. "No negative words are used in connection with this requirement." Upington v. Oviatt, 24 Ohio St. 232, 241.

Law requiring records, held directory. Barton v. Pittsburgh, 4 Brewst. (Pa.) 373.

The unrecorded acts of a borough council if clearly proved, are valid. Avoca v. Pittston, J. & A. R. Co., 7 Kulp. (Pa.) 470.

municipal government are also expressly required to keep full records of their public transactions.<sup>6</sup> And it has been held that although the law may not in express terms direct the keeping of such records the duty of so doing by necessary implication is imposed.<sup>7</sup>

The law requires a record to the end that those who may be called to act under it may have no occasion to look beyond it; to avoid the mischief of leaving municipal corporate action to be proved by parol evidence; to make it certain that rights which have accrued under such actions shall not be destroyed or affected by the always fallible and often wholly unreliable recollection of witnesses, however truthful and intelligent they may be. For similar reasons the law requires conveyances of lands, wills, certain contracts, records of courts and legislation to be in writing.<sup>8</sup>

Ordinarily the validity of an ordinance or resolution is not affected by the fact that, through an oversight of

6. Board of public works must keep records. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526; *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22.

Township board bound to keep records. *Fayette County v. Chitwood*, 8 Ind. 504.

Public boards. It is advisable that records should be kept. *Gearhart v. Dixon*, 1 Pa. St. 224, 228.

7. Duty to keep records is implied. Where the charter did not require in express terms the board of public improvements which had charge of streets, sewers, parks and all public works of the city to keep records of its proceedings the court held that such records

should be kept and might be used as evidence in order to show the proceedings of the body. *Fruin-Brambrick Construction Co. v. Geist*, 37 Mo. App. 509, 515.

The same rule has been declared in Michigan relative to the board of public work of Detroit which in effect was held to be a *quasi*-public corporation and the nature of its duties in establishing streets, sewers, etc., demanded a record of its proceedings. *Larned v. Briscoe*, 62 Mich. 393, 396, 29 N. W. 22.

8. *Sawyer v. M. & K. R. R.*, 62 N. H. 135, 155, 156, 13 Am. St. Rep. 541, per Carpenter, J.

the clerk, it is not copied upon the municipal records.<sup>9</sup> But where the law, in express terms, requires ordinances to be recorded and published before going into effect, and this is not done, bonds issued in pursuance thereof are void.<sup>10</sup>

### § 618. Who to keep municipal records.

The law usually designates the officer or persons authorized to make and keep the municipal records. The person so designated and no other is the only one legally authorized to keep them. In the absence of the persons so named, charters often provide for the appointment of a clerk or secretary *pro tem*,<sup>11</sup> but in the absence of such provision it has been held that corporations have the incidental power to name a person for this purpose. Records kept by such person or records completed by the secretary or clerk from memoranda kept by the temporary clerk, duly appointed by the corporate authori-

9. *Crebs v. Lebanon*, 98 Fed. 549; *Parr v. Greenbush*, 72 N. Y. 463.

Omission to record vote in a private corporation. So failure to enter a vote of stockholders in a private corporation in the corporation records at the time when it was adopted does not invalidate it. Here the resolution was adopted in 1886 and formally entered of record two years thereafter when the omission was discovered. *Brown, J.*, observed: "The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proved as well by parol as by written entries." *Handley v. Stutz*, 139 U. S. 417, 422, 11 Sup. Ct. Rep. 530, 35 L. Ed. 227; *Moss v. Averell*, 10 N. Y. 449, 454.

10. *Bank of Commerce v. Granada*, 10 U. S. App. 692, 54 Fed. 100; 48 Fed. 278, 44 Fed. 262.

Recording resolution. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

11. *Kellar v. Savage*, 17 Me. 444.

When minutes are kept by a clerk *pro tem*., where the clerk was absent, the clerk cannot decline to record them, but he must enter the proceedings, subject to the correction by the council. *People v. Ihnken*, 129 Mich. 466, 89 N. W. 72, 8 Detroit Leg. N. 1033.

Minutes of the council submitted to and approved by it may be recorded by the deputy clerk in the absence of the clerk. *Swan v. Indianola*, 142 Iowa 731, 121 N. W. 547.

ties, are legal evidence of the transactions of the corporate meeting.<sup>11a</sup>

There cannot be a legal record without one to keep it, as a clerk or secretary or one duly appointed for this purpose.<sup>12</sup> The appointment of one to keep the records by the presiding officer without objection may be considered an appointment by the meeting.<sup>13</sup> In one case the selectmen of a town without express authority appointed a temporary clerk, who acted without objection, and his record of the transactions of the meeting were held valid on the *de facto* principle.<sup>14</sup>

The mere failure of the clerk to take the oath of office does not invalidate his record.<sup>15</sup>

### § 619. Sufficiency of record—presumptions.

The record, to be complete, should show all of the essential or material facts respecting the corporate vote, act or transaction—that all of the mandatory charter provisions have been followed substantially.<sup>16</sup> It is a

11a. *Hutchinson v. Pratt*, 11 Vt. 402, 420; *Hickok v. Shelburne*, 41 Vt. 409.

12. *Attorney General v. Crocker*, 138 Mass. 214.

13. *State v. McKee*, 20 Ore. 120, 25 Pac. 292; *State v. Smith* (Ore., 1890), 25 Pac. 339.

14. The court held that a protest by a voter after the meeting respecting the legality of the election because the one named acted as clerk would not avail, but declined to say what effect a protest would have provided it had been made at the time the meeting was being held. *Attorney General v. Crocker*, 138 Mass. 214, 219.

15. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27; *Bartlett v. Kinsley*, 15 Conn. 327; *Kellar v. Savage*, 17 Me. 444.

It is not necessary to show that the clerk who made the record was duly elected or appointed and sworn. *Lemington v. Blodgett*, 26 Vt. 210.

16. *People ex rel. v. Starne*, 35 Ill. 121; *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450; *State (Pope) v. Union*, 32 N. J. L. 343; *Logan v. Tyler*, 1 Pitts. (Pa.) 244.

**Signing.** The minutes of the council need not be signed by the clerk who records them, unless so required by charter. *State ex rel. v. Badger*, 90 Mo. App. 183.

**Recording ordinance.** *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577.

**Interlineation of record** does not invalidate, respecting appointment by council. *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399.



reasonable rule that courts will not require the same exactness in keeping the records of a town as in case of court records.<sup>17</sup>

Although the record may be in certain particulars incomplete if it appears from such record that the proceedings were regular and in substantial compliance with the charter and law presumptions will be indulged in favor of its sufficiency and the validity of the corporate acts.<sup>18</sup> Thus where the record is silent as to the mode in which a corporate act was done, as for example, the election of officers, the presumption will be, without proof to the contrary, that they were chosen in the manner prescribed by law.<sup>19</sup> So, in a proceeding where the record recites that the rules were suspended, but omits to state by what vote, it will be presumed that they were suspended by the vote required, and hence oral evidence tending to show the contrary will be rejected.<sup>20</sup> So, where the record shows that an ordinance is signed by the mayor and attested by the clerk, it will be presumed that the signature was rightfully made, and the minutes need not affirmatively show the mayor's pres-

17. *Hazelgreen v. McNabb*, 23 Ky. L. Rep. 811, 64 S. W. 431.

18. *Colorado*. *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460.

*Iowa*. *Brewster v. Davenport*, 51 Iowa 427, 1 N. W. 737; *State v. Vail*, 53 Iowa 550, 5 N. W. 709; *Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148.

*Kansas*. *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281.

*Kentucky*. *Lexington v. Headley*, 68 Ky. (5 Bush.) 508; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

*Minnesota*. *Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235.

*Missouri*. *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249.

*New Jersey*. *Durant v. Jersey City*, 25 N. J. L. (1 Dutch.) 309.

*New York*. *In re City of Buffalo*, 78 N. Y. 362; *In re Board of Rapid Transit Railroad Comrs.*, 18 N. Y. S. 320.

*Washington*. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.

*Wisconsin*. *O'Mally v. McGinn*, 53 Wis. 353, 10 N. W. 515.

19. *Hathaway v. Addison*, 48 Me. 440.

See case n. 27 *infra*.

As to sufficiency of record in appointment of officers, see *Pierce v. Richardson*, 37 N. H. 306.

20. *Eldora v. Burlingame*, 62 Iowa 32, 37, 17 N. W. 148.

ence at the meeting at which the ordinance was passed.<sup>21</sup> So, whenever it is not affirmatively shown by the record (mere silence of the record not amounting to such a showing) that the charter provisions relative to the adoption of an ordinance have not been complied with, the ordinance in controversy will be deemed to have been regularly adopted.<sup>22</sup> So, a record that a public officer "took the oath of office," imports the oath prescribed by law.<sup>23</sup> Many other illustrations appear in the cases in the note.<sup>24</sup>

21. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

Sufficiency of record, showing presence of mayor at meeting. *Martin v. State*, 23 Neb. 371, 36 N. W. 554.

22. *Portland v. Yick*, 44 Ore. 439, 75 Pac. 706.

23. *Scammon v. Scammon*, 28 N. H. 419, 429.

24. Sufficiency of record—illustrations. Sufficiency of record in particular case. *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 13 N. W. 153.

When record incomplete in a particular case. *Jones v. McAlpine*, 64 Ala. 511.

After ordinance has been duly passed and recorded, subsequent unauthorized alteration will not affect its validity. *Houston & Texas C. R. R. Co. v. Odum*, 53 Tex. 343, 352.

Proof of notice of special meeting need not be recorded unless the law so requires, for it will be presumed that notice was properly given. *Board of Supervisors v. Judges*, 106 Mich. 166, 64 N. W. 42.

Where the facts essential to give jurisdiction to an inferior or special tribunal of limited authority

are shown by its records, the same presumption prevails in favor of its jurisdiction as prevails in favor of the jurisdiction of superior courts of general jurisdiction, and the statement of jurisdictional fact cannot be denied upon a collateral attack, nor will its plain errors affect it. Rule applied to town council records. *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223.

Where the charter requires authentication of an ordinance by the mayor and recorder, authentication by the acting mayor and acting recorder is sufficient. *Lackey v. Water Co.*, 80 Ark. 108, 96 S. W. 622.

Where several resolutions are passed together, separate vote on each not required. *Wright v. Forestal*, 65 Wis. 341, 27 N. W. 52.

On motion to adjourn, the vote in detail need not be recorded. *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503.

Recital in the record that all of the members of the body were present and the ordinance passed unanimously is sufficient. *Schofield v. Tampico*, 98 Ill. App. 324.

Sufficiency of record in showing the passage of an ordinance by

But in the silence of the record no presumption obtains that other proceedings than those mentioned in the record took place, as in the passage of an ordinance, that the yeas and nays were called and a majority of the members

the requisite vote. *Schofield v. Hudson*, 56 Ill. App. 191.

A memorandum, made by the clerk, of the proceedings which is intelligible to no one but himself, and from which he wrote out and had published what he understood to be the ordinance was held an insufficient record to show the passage of the ordinance. *Louisville v. McKegney*, 70 Ky. (7 Bush.) 651.

In one case the record stated that a particular resolution was introduced and read, that a motion was made that the vote upon the resolution be by ballot and that the motion was put and carried,—the record fails to show the adoption of the resolution. *State v. Curry*, 134 Ind. 133, 33 N. E. 685.

Where the charter required concurrence of the two branches of the council and the record of one branch states that a certain vote was in concurrence with the vote of the other branch, but the whole records of both branches show that the vote was only a vote of one branch, the erroneous statement will be disregarded. *Saunders v. Lawrence*, 141 Mass. 380, 5 N. E. 840.

A charter provision which prescribed that "before the presiding officer shall affix his signature to any bill he shall suspend all other business, declare that the

bill shall now be read and that, if no objection be made he will sign the same," is merely directory and where the record shows that the signature of the presiding officer was affixed in open session and that no objections are made, the ordinance is valid although the record fails to show that the other formalities were observed. *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep. 530, 8 L. R. A. 110, 13 S. W. 98; *Heman Const. Co. v. Loevy*, 64 Mo. App. 430.

Where the charter requires notice to be given relating to the passage of an ordinance the giving of such notice need not appear on the records. *Barr v. New Brunswick*, 58 N. J. L. 255, 33 Atl. 477.

Where the recorded minutes show what members of the council were present, and that a roll call was had, a failure on the part of the clerk to rewrite the names in recording the vote, where all vote one way, will not be fatal. *Bennett v. Emmelsturg*, 138 Iowa 67, 115 N. W. 582.

A recital in the minutes of a meeting of the council that such meeting was an adjourned session will not be accepted without proof where there is nothing to show that the minutes of the preceding meeting were ever approved or adopted by the council or

of the body voted in favor of it.<sup>25</sup> So, no presumption arises that an ordinance was passed from the recital of the fact in the record that it was reported, nor from the further fact that contracts were made and work performed under such ordinance.<sup>26</sup> So, where officers are to be elected by ballot and a majority vote, the record, to be complete, must show these facts.<sup>27</sup> And it is undoubtedly true that, where the charter requires particular corporate acts to be performed by a specified vote, as a majority, two-thirds or three-fourths, the record of the proceedings must show affirmatively that the measure received the vote prescribed.<sup>28</sup> Ordinarily this will not be presumed.<sup>29</sup>

signed by the mayor as required by statute. *O'Brien v. Drinkenberg*, 41 Mont. 538, 111 Pac. 137.

A resolution presented to the council will be presumed to have carried if the records of the meeting show facts from which such a legal conclusion may be drawn. *Sackett v. Morris*, 149 Ill. App. 152.

Where a statute provides that a rule requiring an ordinance to be read on three different "days" may be dispensed with by three-fourths of the council, an inaccuracy in the record of an ordinance stating that the ordinance was read at three separate "meetings" is not fatal to the validity of the ordinance if it was adopted by the unanimous vote of all the councilmen except one, who was absent. *Collins v. Iowa City*, 146 Iowa 305, 125 N. W. 226.

25. *Tracey v. People*, 6 Colo. 151, 155, 4 Am. & Eng. Corp. Cas. 373; *Ryan v. Lynch*, 68 Ill. 160.

26. *Covington v. Ludlow*, 1 Metc. (Ky.) 295; compare *Lex-*

*ington v. Headley*, 5 Bush. (Ky.) 508.

27. *Scammon v. Scammon*, 28 N. H. 419, 429. See cases n. 19, *supra*.

28. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577; *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184, 30 Am. & Eng. Corp. Cas. 453, n.; *Chicago Dock Co. v. Garritty*, 115 Ill. 155, 3 N. E. 448; *Rich v. Chicago*, 59 Ill. 286; *Logansport v. Legg*, 20 Ind. 315; *Moberry v. Jeffersonville*, 38 Ind. 198; *Brookbank v. Jeffersonville*, 41 Ind. 406.

29. In *re Carlton Street*, 16 Hun (N. Y.) 497, 499, 78 N. Y. 362; *Spangler v. Jacoby*, 14 Ill. 297. See *Young v. St. Louis*, 47 Mo. 492, 495.

Where the statute in express terms requires a record, no presumption arises as to regularity of proceedings not appearing on record, even though parties may have acted upon the supposed orders of county board. *Gorman v. Boise County Com'rs*, 1 Idaho 553.

Where bills are required to be read a certain number of times before passage the record should show that this has been done.<sup>30</sup> However, it has been held that it is not necessary that the record should show that the bill was read the number of times prescribed, for this will be presumed to have been done unless the record affirmatively shows that it was not done.<sup>31</sup>

### § 620. Same—taking yeas and nays.

In the taking of yeas and nays, a record which recites plainly the vote of each member on the proposition is sufficient.<sup>32</sup> Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of

30. Sufficiency of recital of third reading. *Rockville v. Merchant*, 60 Mo. App. 365, 371.

31. Supervisors of Schuyler v. *People ex rel.*, 25 Ill. 181, 184.

As to reading—presumption. If journal recites that the ordinance was presented and “laid over under the rules,” it will be presumed that it was read as well as presented, where one of the rules adopted by the council requires that all ordinances, “after being presented and read, shall lie over one week” before final action. *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, 65 N. E. 325, affirming 100 Ill. App. 57.

Where the law “does not require a fact to be recorded upon the journal, and it can be inferred from recital in the journal that such fact existed, or such step was taken, then the presumption will be indulged that such fact did exist, or such step was taken, in order to sustain the validity of the law, where the contrary does not appear from the journal itself.” Per Magruder, C. J., in *Ib.*,

p. 342; *Wabash Ry. Co. v. Hughes*, 38 Ill. 174.

32. *Delphi v. Evans*, 36 Ind. 90; *Marion Water Co. v. Marion*, 121 Iowa 306, 318, 96 N. W. 883; *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577.

Record on yeas and nays. Where it appears that nine out of ten of the aldermen were present at the submission of an ordinance, and the entry in the record declared it to have been “adopted by a majority vote,” it will be presumed that it received the majority vote required by the charter, and not a mere majority of a quorum. *McCormick v. Bay City*, 23 Mich. 457, 463.

Where a council is composed of the mayor, recorder and six trustees and the record shows that the mayor and five trustees voted in favor of the ordinance and it did not appear that any other members of the council were present, held not necessary to call for the nays. *Bayard v. Baker*, 76 Iowa 220, 23 Am. & Eng. Corp. Cas. 126, 40 N. W. 818.

the record is sufficient.<sup>33</sup> In Michigan it has been held that, the record of a vote reciting that it "was adopted unanimously on call," the names of those voting not otherwise appearing than by the statement of those present at the opening of the session, is not a compliance with the requirement. The ayes and noes must be entered at large on the minutes.<sup>34</sup> This rule has been affirmed

33. *Board of Comrs. v. Loan & Trust Co.*, 143 N. C. 110, 55 S. E. 442.

Cases illustrating sufficiency of record on the taking of the yeas and nays. Where the record recites that "upon the ballot being spread for its approval and adoption, the vote stood as follows: Ayes (names following). Noes, none," it is sufficient. "While the usual parliamentary mode of taking such a vote is by a call of the roll, and it was doubtless contemplated by the law-makers, still it is not to be regarded as essential. *Brophy v. Hyatt*, 10 Colo. 223, 226, 227, 15 Pac. 399; *Tracy v. People*, 6 Colo. 151.

Where the record shows that all of the members of the body voted for the proposition, it sufficiently shows the taking of the yeas and nays. *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577.

Record showed the members present, and recited: "All present voting in favor thereof (act in question) and no one against same." Held sufficient. *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613, 67 Pac. 1043; *German Ins. Co. v. Manning*, 95 Fed. 597; compare *New Albany Gas Light Co. v. Crumbo*, 10 Ind. App. 360, 37 N. E. 1062; *State v. Nebraska Tel. Co.*, 127 Iowa 194, 103 N. W. 120.

34. "We are of opinion that the record does not show with sufficient certainty that all the members present at roll-call, at the opening of the meeting in question, voted for the resolution; and if it does not show that all did, it does not show that any particular one of them did. What it does show is, that at roll-call when the meeting was opened certain members named were present, and that afterwards, before the meeting adjourned, certain resolutions were adopted unanimously on call. There is no legal presumption that all the members who were present at the call to order remained until adjournment, and that no others came in and took their seats afterwards, nor that every member voted on the resolution on roll-call." Per Cooley, J., in *Steckert v. East Saginaw*, 22 Mich. 104, 108.

In the absence of a statute or rule requiring yeas and nays of the council to be recorded no record of the vote need be made. *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577.

Compare *McCormick v. Bay City*, 23 Mich. 457; *Gilberts v. Rabe*, 49 Ill. App. 418; *Scofield v. Tampico*, 98 Ill. App. 324, 326.

in other jurisdictions.<sup>35</sup> If the charter expressly requires the yeas and nays to be recorded as well as taken, some courts declare the provision mandatory.<sup>36</sup>

The essential thing is that the record should show that the ordinance was passed as prescribed by law; that

35. Where the charter requires all votes on resolutions to be "by calling the roll, the members voting aye or nay," and that the vote of each member shall be recorded in the minutes or journal of the proceedings, the record of a vote on a resolution reciting "all voting aye" is insufficient. *In re South Market St.*, 76 Hun (N. Y.) 85, 27 N. Y. S. 843; *In re Younglove*, 80 Hun (N. Y.) 246, 29 N. Y. S. 1030.

Record showed that yeas and nays were called and that a specified number of votes were cast, but omits the names of those voting or how each voted. Held insufficient to show passage of ordinance. *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90.

Record should show not only the number of votes cast and the fact that the yeas and nays were called, but likewise the names of the members voting and how each voted, whether yea or nay. *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90.

Record showed majority of members present, stating their names, and that the ordinance was passed unanimously. Held sufficient, in absence of charter provision requiring names of those voting for or against to be recorded. *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. (Pa.) 271.

The name of each member's vote need not be recorded. *State*

*v. Vail*, 53 Iowa 550, 5 N. W. 709; *Brewster v. Davenport*, 51 Iowa 427, 1 N. W. 737; *Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148; *Solomon v. Hughes*, 24 Kan. 211; *Barr v. Auburn*, 89 Ill. 361; compare *Schofield v. Hudson*, 56 Ill. App. 191.

36. *In re Carlton Street*, 16 Hun (N. Y.) 497, 78 N. Y. 362; *Spangler v. Jacoby*, 14 Ill. 297; *Cutler v. Russellville*, 40 Ark. 105; *Olin v. Meyers*, 55 Iowa 209, 7 N. W. 509.

The requirements of a charter that the yeas and nays be entered upon the records, held mandatory, and therefore a record failing to show that they were so taken is incomplete. *O'Neill v. Tyler*, 3 N. D. 47, 53 N. W. 434.

"No bill shall become an ordinance, nor resolution be adopted unless finally passed by a majority of all the members of the board, and the vote be taken by yeas and noes and the names of the members voting for and against the same be entered in the journal." Charter San Francisco, art. II, ch. 1, § 9; Statutes and Amend. to Codes of Cal., p. 245.

Subject to certain exceptions named in the statute the record of a resolution adopted by a town council in Iowa need not show the yeas and nays. *Sawyer v. Lorenzen* (Iowa, 1910), 127 N. W. 1091.

it received the necessary number of votes. The calling of the yeas and nays is a means of ascertaining this fact, and the recording of them furnishes a permanent record of such fact. To sustain a record which recites that a sufficient number were present when the body convened, and other business was transacted, and then the ordinance in question was passed unanimously, necessarily requires the inference that all remained throughout the meeting or all reappeared when the ordinance was placed on its passage. The calling of the yeas and nays upon the final vote and the recording of the names of those voting for and against certainly is the best form in which to provide absolute proof that the ordinance received the vote prescribed. The best judicial opinions sustain this view. The calling of the ayes and noes and the recording of the names voting for and against should be required that it may affirmatively appear who were present at the passage of the ordinance. When the door for the surreptitious passage of ordinances has been closed by charter or statute it ought not to be opened by judicial construction.<sup>37</sup>

### § 621. Municipal records as evidence.

Municipal records properly authenticated or verified are competent evidence of the corporate proceedings of the legislative or governing body and of the transactions of officers and boards connected with the local government.<sup>38</sup> Records imperatively required by law, made by

37. See dissenting opinion in *Barr v. Auburn*, 89 Ill. 361, 363, and *Steckert v. East Saginaw*, 22 Mich. 104, 108, per Cooley, J.

Compare *Schofield v. Hudson*, 56 Ill. App. 191.

Burden of proof is on the one who denies the calling of the yeas and nays. *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443.

As to admissibility of parol evi-

dence to prove the taking of the yeas and nays, see § 622 *post*.

38. *Connecticut*. *School District v. Blakeslee*, 13 Conn. 227.

*Illinois*. *St. Charles v. O'Malley*, 18 Ill. 407.

*Missouri*. *Fruin-Brambrick Construction Co. v. Geist*, 37 Mo. App. 509, 515.

*New Jersey*. *State v. Van Winkle*, 1 Dutch (25 N. J. L.) 73.



the proper officers, are conclusive of the facts therein stated, not only upon the corporation, but upon all the world as long as they stand as records. Their accuracy can be contradicted or impeached only in proceedings instituted directly for the purpose, and to the end that the record may be corrected. So long as they are in existence and can be produced they are the only competent evidence of the acts of the corporation. If they are destroyed or lost secondary evidence may be received to prove them.<sup>39</sup>

*New York.* Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194, 205; Highland Turnpike Co. v. McKean, 11 Johns. (N. Y.) 98; McFarlan v. Tritton Insurance Co., 4 Denio (N. Y.) 392.

*North Carolina.* Weith v. Wilmington, 68 N. C. 24, 27.

*Vermont.* Hutchinson v. Pratt, 11 Vt. 402.

Description of territory incorporated proved by record of incorporation. Bradley v. Spickardsville, 90 Mo. App. 416.

When the proper custodian subscribes his official attestation to a purported copy of a municipal record in his keeping, he to all intents and purposes affirms or certifies its correctness. Sawyer v. Lorenzen & Weise (Iowa, 1910), 127 N. W. 1091.

39. *Connecticut.* Samis v. King, 40 Conn. 298, 304.

*Indiana.* Byer v. New Castle, 124 Ind. 86, 24 N. E. 578.

*Kentucky.* Mt. Pleasant v. Eversole, 29 Ky. L. Rep. 830, 96 S. W. 478.

*Michigan.* Stevenson v. Bay City, 26 Mich. 44.

*New Hampshire.* Sawyer v. M. & K. Ry., 62 N. H. 135, 153; Pickering v. Pickering, 11 N. H. 141,

144; Greeley v. Quimby, 22 N. H. 335; Harris v. School District, 28 N. H. 58, 66; Oxford v. Benton, 36 N. H. 395, 403; Farrar v. Fessenden, 39 N. H. 268; Hampstead v. Plaistow, 49 N. H. 84, 96; Bell v. Pike, 53 N. H. 473; Hill v. Godwin, 56 N. H. 441.

*New York.* People v. Adams, 9 Wend. (N. Y.) 333; People v. Zeyst, 23 N. Y. 140.

Where the enactment of an ordinance is denied "the fact can only be proved by the deliberations of the council and their promulgation, duly attested." Mandeville v. Band, 111 La. 806, 35 So. 915.

Book containing the minutes of the proceedings of a municipal corporation is the best and only evidence to prove whether or not a claim was allowed by the council. Perryman v. Greenville, 51 Ala. 507, 511.

Books of a corporation, established for public purposes, are evidence of its acts and proceedings. Owings v. Speed, 5 Wheat. (U. S.) 420.

Books of account of a municipal corporation properly kept are admissible to charge the city. St. Louis Gas Light Co. v. St. Louis,

While the original minutes, or records, constitute the primary evidence of the facts recited therein, properly authenticated copies of the proceedings of a municipal

84 Mo. 202, affirming 11 Mo. App. 55.

So books of a town, not kept with technical accuracy, are competent evidence of facts recited therein. *Greenfield v. Camden*, 74 Me. 56.

So books kept by selectmen, containing accounts of the business and expense of the town, are evidence in a suit against the town. *Thornton v. Campton*, 18 N. H. 20.

**Contra.** In an action of assumpsit to recover money allowed by resolution of the board of aldermen of a town, in settlement of his accounts as town marshal, the books of the town were produced to support the claim, from which it appeared that the sum demanded had been allowed. The town contended that the resolution had been passed by mistake, and offered to show by the same books the passage of a subsequent resolution by the board of aldermen, rescinding the first, and reducing the account. The second resolution was rejected on authority of the general rule, stated in 1 *Starkie on Ev.* 292, that the books of a corporation are evidence between the members of the body, or against the body, but they are not evidence for the corporation against a stranger. *Tuskaloosa v. Wright*, 2 Porter (Ala.) 230. This case is against the weight of authority.

Records of council in letting contract to grade, competent evi-

dence. *O'Dea v. Winona*, 41 Minn. 424, 43 N. W. 97.

Record of proceedings of town meeting, competent to show that the meeting was legally warned for the purpose of making a by-law. *Isbell v. N. Y. & N. H. R. R.*, 25 Conn. 556.

Records of board of health, when conclusive. *Stratton v. Lowell*, 181 Mass. 511, 63 N. E. 948.

Ordinances are the best proof of municipal regulations. Hence, regulations of departments cannot be proved by officers where the subject-matter is covered by ordinances, or other records. *Rehberg v. New York*, 99 N. Y. 652, 2 N. E. 11.

Official record admissible to show passage of ordinance. *People v. Murray*, 57 Mich. 396, 24 N. W. 118.

Records of the location and alteration of streets admissible. *Barker v. Fogg*, 34 Me. 392.

Original minutes of council, when verified, are admissible. *O'Mally v. McGinn*, 53 Wis. 353, 357, 10 N. W. 515.

Original minutes competent *without proof of their verity*. *Denning v. Roome*, 6 Wend. (N. Y.) 651, 656.

Minutes of council as evidence —parol proof. *State ex rel. v. Hauser*, 63 Ind. 155.

Original minutes taken at the meeting of a religious society held admissible. *Waters v. Gilbert*, 2

corporation or other public body have frequently been admitted as evidence.<sup>40</sup> But this subject is usually regulated by statute.

## § 622. Reports of committees and officers as evidence.

Reports of committees and officers may be introduced in evidence.<sup>41</sup> Where the report or recommendation of a committee of the council or legislative body is ratified

Cush. (Mass.) 27; Pruden v. Alden, 23 Pick. (Mass.) 184.

District school book competent evidence. Gearhart v. Dixon, 1 Pa. St. 224; Monaghan v. Randall, 38 Wis. 100, 106.

Record of secretary of school board admissible to show issuance of school bonds. Board, etc. v. Moore, 17 Minn. 412.

Election returns are admissible. They are documents of a public nature. Where they are produced by the sworn custodian, the party offering them in evidence is not required to explain an erasure and alteration visible upon the face thereof which appears to have been made at the same time and by the same hand as the obliterated letters and figures. People ex rel. v. Minck, 21 N. Y. 539, 541.

When persons other than town officers may identify books and town records, thus rendering them admissible as evidence, see Hathaway v. Addison, 48 Me. 440.

Minutes of council meeting identified by clerk who kept them as correct are competent. State ex rel. v. Badger, 90 Mo. App. 183.

40. Metropolitan Street R. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Dudley v. Grayson, 6 T. B.

Monroe (Ky.) 259, 261; Hickock v. Shelburne, 41 Vt. 409.

Sufficiency of authentication. Sanborn v. School District, 12 Minn. 17.

Proceedings of corporate meeting need not be authenticated by a corporate seal. Brady v. Brooklyn, 1 Barb. (N. Y.) 584.

41. Reports as evidence. In order to show the terms of a resolution of a board of surveys, recommending to the council the passage of an ordinance authorizing the construction of a branch sewer, the original minutes of the meeting of the board at which the subject was referred to a subcommittee, the original report of the subcommittee and the original draft of the final resolution of the board may, upon being produced and duly authenticated, be offered in evidence. Waln v. Philadelphia, 99 Pa. St. 330.

City engineer's estimates, filed in engineer's department, admissible. Clarke v. Williams, 29 Neb. 691, 696, where it is said: "These surveys were made by sworn officials of the city for the sole purpose of arriving at a correct estimate of the amount of earth to be removed and were *prima facie* correct."

in due form, it at once becomes an act of the body, and, therefore, a part of its record.<sup>42</sup> And it has been held that in an action against the municipal corporation for damages on account of a defective highway, the records of the council are competent to show the report of a council committee and the action of the council thereon respecting the defective highway.<sup>43</sup> But it was held in an early Massachusetts decision that in such case the reports of committees, appointed by the town to inquire into the facts of the case, and the votes of the town receiving such reports are not admissible in evidence against the town, where such reports did not set forth facts showing the liability of the town, and where the votes neither acknowledge any liability, nor direct settlement in behalf of the town. Here it was held that the acceptance of the reports was no admission of the facts reported. The vote was to accept the report, "and have no further action on the subject," which the court construed to mean that the report was to be received only and not adopted by the town.<sup>44</sup>

### § 623. Parol evidence to prove record.

Ordinarily, acts or proceedings of municipal corporations, their officers and boards may only be proved by the record. The record is presumed to contain the fundamental attribute of verity, and without which the first

42. *Aurora Water Co. v. Aurora*, 129 Mo. 541, 31 S. W. 946; *Salmon v. Haynes*, 50 N. J. L. 97, 11 Atl. 151; *Milford School Dist. v. Powner*, 126 Ind. 528.

43. *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98, dissenting from *Dudley v. Weston*, 1 Met. (Mass.) 477, and *Collins v. Dorchester*, 6 Cush. (Mass.) 396.

**Records of council as evidence.** Admissible to show notice or knowledge of defect by city. *Chicago v. Powers*, 42 Ill. 169.

Resolution of council directing board of public works to make the highway where the injury occurred passable is competent to prove knowledge of defective condition by city. *Erd v. St. Paul*, 22 Minn. 443.

Resolution of council admitted. *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

44. *Dudley v. Weston*, 1 Metc. (Mass.) 477, approved in *Collins v. Dorchester*, 6 Cush. (Mass.) 396, 397.

and most important definition of a record is not answered. Where it leaves the truth of what took place to be ascertained by an investigation of the antecedent facts upon which it purports to be based, as though nothing had been written, it is no record.<sup>45</sup>

The general rule that parol evidence is inadmissible to supply omissions, contradict or explain records, applies to proceedings showing corporate action of parishes, school districts, and all forms of public or municipal corporations, full and *quasi*.<sup>46</sup> That is, parol

45. *Bell v. Pike*, 53 N. H. 473. Per Campbell, J., in *Stevenson v. Bay City*, 26 Mich. 44, 46.

Parol proof of proceedings of a council and declarations of individual members thereof, in ordering the grading of a street, is not admissible, until some valid reason is shown for not producing the record of such proceedings. *Aurora v. Fox*, 78 Ind. 1.

Where the law requires a board of public works to keep a record of its proceedings, evidence of oral instructions in open session to the commissioner is inadmissible. *Davis v. Jackson*, 61 Mich. 530, 539, 28 N. W. 526, distinguishing *Chilson v. Wilson*, 38 Mich. 267.

Parol proof that an ordinance was passed is inadmissible where the record only shows that it was reported. *Covington v. Ludlow*, 1 Metc. (Ky.) 295.

46. *Connecticut*. *Gilbert v. New Haven*, 40 Conn. 102.

*Illinois*. *People ex rel. v. Madison Co.*, 125 Ill. 334, 17 N. E. 802, affirming 23 Ill. App. 386.

*Louisiana*. *Gaither v. Green*, 40 La. Ann. 362.

*Maine*. *Crommett v. Pearson*, 18 Me. 344.

*Massachusetts*. *Halleck v. Boylston*, 117 Mass. 469; *Andrews v. Boylston*, 110 Mass. 214; *Wood v. Simons*, 110 Mass. 116; *Adams v. Pratt*, 109 Mass. 59; *Mayhew v. Gay Head*, 13 Allen (Mass.) 129, approved in *Morrison v. Lawrence*, 98 Mass. 219, 221; *Saxton v. Nimms*, 4 Mass. 315; *School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Manning v. Gloucester*, 6 Pick. (Mass.) 6.

*Michigan*. *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22; *Moser v. White*, 29 Mich. 59.

*Missouri*. *Keating v. Skiles*, 72 Mo. 97.

*New York*. *People ex rel. v. Zeyst*, 23 N. Y. 140.

*Pennsylvania*. *Pittsburg v. Cluley*, 74 Pa. St. 262.

*Vermont*. *Eddy v. Wilson*, 43 Vt. 362; *Cabot v. Britt*, 36 Vt. 349; *Hoag v. Durfey*, 1 Aiken (Vt.) 286.

*Wisconsin*. *Monaghan v. Randall*, 38 Wis. 100, 106.

Parol evidence held inadmissible to prove that the measure was carried by a two-thirds vote as required. This fact must distinctly appear from the record. In *re Carlton Street*, 16 Hun (N. Y.) 497, 499.

evidence cannot be admitted either to explain, enlarge or contradict a record of the proceeding of a municipal body where the entry of record is made in pursuance of law in good faith, and is complete and unambiguous.<sup>47</sup>

Parol evidence to prove the vote at a corporate meeting inadmissible. *School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Sawyer v. M. & K. R. R. Co.*, 62 N. H. 135, 153.

The legal effect of a vote cannot be explained away by parol evidence. *Cameron v. North Hero*, 43 Vt. 507, 510.

Township board can only speak by its record. *Fayette County v. Chitwood*, 8 Ind. 504.

Not admissible to prove transactions of school district meeting. *Moor v. Newfield*, 4 Me. 44, 46.

Clerk's attestation of date of mayor's approval of ordinance cannot be contradicted by parol. *Ball v. Fagg*, 67 Mo. 481, 484, relying on *Pacific R. R. Co. v. Governor*, 23 Mo. 353.

Some cases hold that acts of the legislature valid on their face may be impeached by the journal. *State v. Platt*, 2 S. C. 150; *Jones v. Hutchinson*, 43 Ala. 721; *People v. De Wolf*, 62 Ill. 253, 255.

Admissible to show mayor approved ordinance, under circumstances of particular case. *Knight v. Kansas City, St. J. & C. B. R. R. Co.*, 70 Mo. 231.

Where the record fails to show the passage of an ordinance by the board of trustees of a town, such fact may be established by parol testimony. *Weatherhead v. Cody*, 27 Ky. L. Rep. 631.

If the record of a city council

in proceedings for public improvements does not show that the council has jurisdiction, it cannot be conferred by adducing parol testimony. *Sedalia v. Scott*, 104 Mo. App. 595, 78 S. W. 276.

47. *Arkansas. Vance v. Austell*, 45 Ark. 400.

*California. Hewell v. Hogan* (Cal. App. 1905), 84 Pac. 1002.

*Connecticut. Bartlett v. Kinsley*, 15 Conn. 327.

*Illinois. Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

*Indiana. Carroll County v. O'Connor*, 137 Ind. 622, 37 N. E. 16.

*Iowa. Mussel v. Tama County* 73 Iowa 101, 34 N. W. 762.

*Kentucky. Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964.

*Maine. Blaisdell v. Briggs*, 23 Me. 123.

*Michigan. Howland v. Prentice*, 143 Mich. 347, 106 N. W. 1105.

*Mississippi. Mullins v. Shaw*, 77 Miss. 900, 27 La. 602.

*Missouri. Ball v. Flagg*, 67 Mo. 481.

*Wisconsin. Chippewa Bridge Co. v. Durand*, 122 Wis. 103, 99 N. W. 603.

Where no record is kept of council proceedings, they may be shown by parol unless the statute forbids. *Swan v. Indianola*, 142 Iowa 731, 121 N. W. 547; *Brown v. Webster City*, 115 Iowa 511, 88 N. W. 1070.

Thus, where the warning of a corporate meeting is required to be recorded, and the record fails to show that the hour of the day for the meeting was specified in the warning, it cannot be shown by parol evidence that in the original warning the hour for the meeting was named.<sup>48</sup> So, where the record of a town meeting held on the first of the month did not state that it was adjourned to the second, parol evidence of an adjournment is inadmissible.<sup>48a</sup> But in a Maine case it was held that, where the record of a town meeting states that, "the inhabitants met in the highway and read the warning in the open air and adjourned the meeting" to a different place, parol evidence is admissible, at the instance of the inhabitants, to prove the time when and the place where the transactions took place, how many persons were present, and that others came afterwards to attend the meeting, and, finding no appearance of such meeting, went home.<sup>49</sup>

The fact of the taking of the yeas and nays can only be shown by the production of the record;<sup>50</sup> however the record may be amended to supply this omission.<sup>50a</sup>

48. "To allow parol proof of that fact as a substitute for a fact that should appear from the record would be to substitute parol proof for the record." *Sherwin v. Bugbee*, 17 Vt. 337, 340.

48a. *Taylor v. Henry*, 2 Pick. (Mass.) 397, *Parker, C. J.*, said (p. 402): "We do not find any case which authorizes the opinion that an adjournment may be proved by parol. And it would be dangerous to admit such proof. Suppose a town be very much divided; it might be hard to decide, without polling, whether a meeting was adjourned or not, and we should have honest and

intelligent men swearing to each side of the question. If a fact of this kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner. This goes to the foundation of our system of civil society."

49. *Chamberlain v. Dover*, 13 Me. 466, 473.

50. *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; *Logansport v. Crockett*, 64 Ind. 319; in re *St. Louis v. Foster*, 52 Mo. 513; *Carlton Street*, 16 Hun (N. Y.) 497, 499.

See § 620 *ante*.

50a. § 626 *post*.

### § 624. Parol evidence to show omissions.

While the decisions present some apparent conflict respecting collateral impeachment of records of public or *quasi*-public corporations which are required by express law to be kept in writing, they are reasonably uniform in admitting parol evidence to establish the real facts of transactions or corporate acts, in the entire absence of all record, or where the record kept is so meager that the particular transaction, act, or vote is not disclosed by it. This principle has been adopted in order to preserve the rights of creditors of the corporation or third persons who have performed work or services or expended money for the benefit of the corporation, relying in good faith upon the regularity and legality of the proceedings. It has also been invoked in other instances as will appear fully from the cases in the note.<sup>51</sup>

51. Parol evidence to show omissions. "When there is an omission to make records, the rights of other persons acting under or upon faith of a vote not recorded, ought not to be prejudiced." Per Williams, C. J., in *Hutchinson v. Pratt*, 11 Vt. 402, 421; *Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

A record of a vote which shows on its face that three members voted yea and three no, may be contradicted by parol showing that two of the latter did not vote at all where the record also shows that members not voting were counted as voting no. *State ex rel. v. Alexander*, 107 Iowa 177, 181, 77 N. W. 841.

School board record showed that a motion was passed, but failed to show what the motion was. The secretary who made the record was allowed to testify what the motion was. Here it

was said: "The oral evidence did not impeach, contradict, or vary the contents of the minutes. It simply supplied an evident omission, and thereby applied it to its proper subject—the record of the vote of the directors." *Morgan v. Wilfley*, 71 Iowa 212, 213, 32 N. W. 265.

In order to show what the action of a township board was on a certain matter parol evidence is admissible, where there is only a brief synopsis of the proceedings entered of record. Here the law did not expressly require a record, nor make the proceeding or acts void unless recorded, nor make the record the only evidence. *Rock Creek Tp. v. Coding*, 42 Kan. 649, 651, 22 Pac. 741.

Joint action of school boards of two townships in detaching certain territory from one school district and attaching it to another



Where the charter or statute applicable declares in express terms that a record shall be kept and shall be the only evidence of corporate acts, the rule of strict construction would exclude parol evidence; but in the absence of such provision courts are more liberal in admitting oral testimony for the purposes within the limitations stated.<sup>52</sup>

er may be shown by parol, in the absence of all record, after acquiescence for five years. *Pine River School Dist. v. Union School Dist.*, 81 Mich. 339, 344, 45 N. W. 993.

Where the law did not require a record and none had been made, parol evidence of a resolution was held competent. *Darlington v. Com.*, 41 Pa. St. 68.

In a suit for salary, an officer may show that a resolution authorizing its payment was duly passed, but through negligence it was not recorded. *Drott v. Riverside*, 4 Ohio Cir. Ct. 312.

Where there is no record, official oath may be proved by parol. *Farnsworth Co. v. Rand*, 65 Me. 19; *Hale v. Cushing*, 2 Me. 218; *Hathaway v. Addison*, 48 Me. 440.

Where clerk *pro tempore* of religious society, through inadvertence, omits to record proceedings in record book, the testimony of the chairman of the meeting who also took minutes for such clerk was admitted as secondary evidence. *Waters v. Gilbert*, 2 Cush. (Mass.) 27, 31.

Parol evidence is admissible to show that the selectmen elected acted as such during the year. *Lemington v. Blodgett*, 37 Vt. 210.

Proof by parol allowed that signers of petition for laying out a highway were freeholders. *Austin v. Allen*, 6 Wis. 134.

*McCormick v. Bay City*, 23 Mich. 457.

"That which is not established by the written record, fairly construed, cannot be shown to vary them." Per Campbell, J., in *Stevenson v. Bay City*, 26 Mich. 44, 47.

Parol may be proper in proper proceedings to compel the clerk to amend his record according to the truth. *Taylor v. Henry*, 2 Pick. (Mass.) 397, 402; *Manning v. Gloucester*, 6 Pick. (Mass.) 6, 16; *Stoughton v. Atherton*, 12 Met. (Mass.) 105, 113.

52. Mandatory provision as to 'keeping record. "When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories." Per Campbell, J., in *Stevenson v. Bay City*, 26 Mich. 44, 46.

### § 625. Same subject — imperfect record — rights of creditors.

Since the rights of creditors and third persons cannot be prejudiced by the entire absence of all record, as stated in the last section, such rights will not be destroyed by the neglect of the corporate officers to keep a proper record.<sup>53</sup> As declared in a New Jersey case, the rights of creditors cannot be made to depend "upon the regularity with which the minutes of the city council are kept, nor whether they are kept at all."<sup>54</sup> Thus, where the records are kept in an imperfect manner, and there is no written evidence in existence to prove that certain work was done by authority of the council, parol evidence will be admissible to prove that fact.<sup>55</sup> So the passage and existence of an ordinance under which a contractor made large expenditures may be shown by parol testimony where the city fails to keep a record of its ordinances.<sup>56</sup> So parol evidence is admissible to show

53. *First Nat. Bk. v. Randall*, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 971; *Blair v. Cary*, 24 Ohio Cir. Ct. Rep. 560.

What the council in fact did may be shown by evidence *aliunde* the record kept by it. *Bridgeford v. Tuscumbia*, 16 Fed. 910, 913, 4 Woods C. C. 611.

54. Per Green, C. J., in *Bigelow v. Perth Amboy*, 25 N. J. L. 297, 301.

55. *Ross v. Madison*, 1 Ind. 281, 284, 48 Am. Dec. 361.

56. Per Brewer, J., in *Troy v. A. & N. R. R.*, 11 Kan. 519, 13 Kan. 70; *Barton v. Pittsburgh*, 4 Brewster (Pa.) 373.

**When parol evidence is admissible.** Parol evidence received respecting contents of an ordinance at time of its passage and subsequent alterations. *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589.

When parol admissible to show mayor approved ordinance, see *Knight v. K. C.*, St. J. & C. B. R. R., 70 Mo. 231.

Omission of school district to make a contract a matter of record is no defense to an action against the district on such contract. *Athearn v. Millersburg*, 33 Iowa 105.

Defective school records may be explained, or omission supplied by parol evidence. *Gearhart v. Dixon*, 1 Pa. St. 224.

When, by statute, ordinances take effect from and after publication they are not inoperative with reference to offenses committed after publication and before the clerk has recorded them. The failure to record does not postpone their taking effect. *Commonwealth v. Williams*, 27 Ky. L. Rep. 695, 86 S. W. 553.

that a quorum was not present and that the city council had no right to transact business, notwithstanding the record recites that a quorum was "found present."<sup>57</sup>

## § 626. Amendment of record.

The courts are liberal respecting amendments of corporate records. If, through inadvertence or misapprehension, the record has been defectively made it is competent to complete it according to the truth.<sup>58</sup> Thus, where the record fails to show that the yeas and nays

57. *Benwood v. Wheeling Ry. Co.*, 53 Va. 465, 44 S. E. 271.

58. *White v. Clarkville*, 75 Ark. 340, 87 S. W. 630.

**Amendment of records.** "Courts have never adopted, and from their nature it would not be practicable to adopt, those strict, technical and peculiar rules as to their correction, which apply to the amendment of judicial records. On the contrary, it is deemed of so great importance to uphold the proceedings of our municipal corporations that courts are disposed to be as indulgent in allowing entries of their proceedings to be amended, as is consistent with the safety of those whose interests would be affected by them. From carelessness, on the part of the clerks of our towns and other municipal corporations, or their not sufficiently appreciating the importance of fully and precisely describing their proceedings, they are frequently entered in their records very loosely and irregularly; and it is not to be expected that those officers will always be competent to per-

form their duties in this respect with the correctness that is desirable. To hold, therefore, that their entries, as first made, are beyond the reach of their subsequent correction, would produce the greatest confusion." *Per Storrs, J.*, in *Boston Turnp. Co. v. Pomfret*, 20 Conn. 590, 595, 596.

"It is competent for any tribunal to correct its record so as to make it speak the truth." *Everett v. Deal*, 148 Ind. 90, 92, 47 N. E. 219; *Anniston v. Davis*, 98 Ala. 629, 39 Am. St. 94, 13 So. 331; *Whittier v. Varney*, 10 N. H. 291; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624; *St. Charles v. O'Malley*, 18 Ill. 407; *Turley v. Logan County*, 17 Ill. 151.

**Record of school districts.** *Haris v. Canaan School District*, 28 N. H. 58.

**Tax bills.** *Stadler v. Roth*, 59 Mo. 400; *Prendergast v. Richards*, 2 Mo. App. 187.

Record has the same force and effect as though originally made as amended. *Gilberts v. Rabe*, 49 Ill. App. 418, 421; *Du Page County v. Martin*, 39 Ill. App. 298.

were taken, it may be amended so that it will speak the truth.<sup>59</sup>

The officer while in office may amend a record made by him.<sup>60</sup> It has been held that one who was formerly town clerk, but who is no longer in office, cannot amend a town record made by him when town clerk.<sup>61</sup> On the other

59. *Logansport v. Crockett*, 64 Ind. 319; *Pineville v. Burchfield*, 19 Ky. L. Rep. 984, 42 S. W. 340.

Allowed if there be matter of record which authorizes amendment by *nunc pro tunc* entry. *Commissioners of Lowndes County v. Hearne*, 59 Ala. 371, 376; *Webb v. Strobach*, 143 Mo. App. 459, 127 S. W. 680.

Defect in passage of an ordinance may be cured by subsequent supplemental action, as by supplying omitted record, where there are no restrictions as to time of making record. *Schenley v. Commonwealth*, 36 Pa. St. 29.

Held to be substantial compliance with the requirement where the minutes gave the name of each councilman present, the number voting in the affirmative and the names of those voting in the negative, and where, upon a correction of the minutes at the next regular meeting, and before the minutes were signed, the names of those voting in the affirmative were inserted. *Becker v. Henderson*, 100 Ky. 450, 38 S. W. 857.

60. *Connecticut*. *Boston Turnp. Co. v. Pomfret*, 20 Conn. 590, 596.

*Illinois*. *Ryder Estate v. Alton*, 175 Ill. 94, 97, 51 N. E. 821; *St. Charles v. O'Malley*, 18 Ill. 407; *Belknap v. Miller*, 52 Ill. App. 617.

*Maine*. *Fossett v. Bearce*, 29 Me. 523; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517.

*Massachusetts*. *Halleck v. Boylston*, 117 Mass. 469; *Saxton v. Nimms*, 14 Mass. 315, 321; *Welles v. Battelle*, 11 Mass. 477.

*New Hampshire*. *Bishop v. Cone*, 3 N. H. 513, 516; *Scammon v. Scammon*, 28 N. H. 419, 429.

*Vermont*. *Hoag v. Durfey*, 1 Aiken (Vt.) 286.

Where there is no proof of the election of one as town clerk such person cannot amend the records of a town meeting. *Taylor v. Henry*, 2 Pick. (Mass.) 397.

61. *Hartwell v. Littleton*, 13 Pick. (Mass.) 229; *Hadley v. Chamberlain*, 11 Vt. 618.

The clerk of a school district after he is out of office and another chosen and sworn in his stead cannot amend the record of the district. *Stoughton v. Atherton*, 12 Metc. (Mass.) 105.

Clerk may amend records made by him, although in the meantime he is out of office, but is again restored. *Mott v. Reynolds*, 27 Vt. 206.

An ordinance was reported to the council and no further action was had thereon. Nearly two years thereafter a new board came in, and, by order, caused the words "passed unanimously" to be added. This was held to be unauthorized. *Covington v. Ludlow*, 1 Met. (Ky.) 295.

hand, it has been decided that the person in office at the time the proceedings were had may make the amendment; that it is not necessary that he should hold the office when the amendment is made.<sup>62</sup>

The records of councils or legislative bodies or departments or boards are generally controlled by the body as a unit, and while the determination of what the record should set forth devolves upon the clerk or secretary in the first instance, as a rule, the propriety of amendments belongs to the body itself.<sup>63</sup> But where the charter required the clerk to keep a record of the proceedings of the council which should be received in all courts as evidence of the truth of the matters therein contained, it was held that it could not be amended by vote of the council, but only by the clerk or by order of court.<sup>64</sup> In one case the record showed the election of a street commissioner by a majority of one vote, resulting from a ruling of the presiding officer, sustained by the council, that a certain member could not change his vote. At its next meeting, before approving the minutes, the council ordered them to be corrected so as to show that the member in question was allowed to change his vote, and, hence, "that there was no election." Here the charter prescribed that, the council "shall determine the rules of their pro-

62. *Gibson v. Bailey*, 9 N. H. 168, 176; *Fossett v. Bearce*, 29 Me. 523; *Kiley v. Cranor*, 51 Mo. 541.

City engineer permitted to amend special tax bill after the expiration of his term of office. *Stadler v. Roth*, 59 Mo. 400; *Kiley v. Oppenheimer*, 55 Mo. 374; *State ex rel. v. Phillips*, 102 Mo. 664, 667, 15 S. W. 319.

63. Council has power to determine whether the journal truly sets forth its proceedings. *State ex rel. v. Cleveland*, 15 Ohio Cir. Ct., 517, 8 Ohio Cir. Dec. 357.

Where the record of the pro-

ceedings of a council fails to show its action in a particular matter, as in approving the report of one of its committees, the council, at a subsequent meeting, may amend the record so as to show the fact. *Adams County v. Quincy*, 130 Ill. 566, 581, 22 N. E. 624.

"A legislative body makes and controls its own records, and decides for itself when it contains a true history of its proceedings." *Gilberts v. Rabe*, 49 Ill. App. 418, 420.

64. *Samis v. King*, 40 Conn. 298, 305.

ceedings and keep a journal thereof," and required the clerk to make an accurate record of all proceedings. The amendment was sustained.<sup>65</sup>

### § 627. Method of amending.

Amendments should only be made on evidence showing the truth of the facts.<sup>66</sup> And it has been said that, ordinarily they should be made from original documents or minutes, and not upon the testimony of third persons, or upon the clerk's own recollection, unless in a very obvious case of omission or error.<sup>67</sup> In one case, amendments were sustained, made some years after the original entry, by the town clerk, on information from others and not on his own personal knowledge, the court observing: "It is sufficient that the fact recorded is ascertained by him, by whatever means, and that it is recorded by him, or by his authority."<sup>68</sup>

Some courts hold that where the record is amended it should appear on the record when, how, and why the amendment was made. It is only when this is done that the true character of the record appears, and all the facts connected with it which are essential to show its validity.<sup>69</sup>

Where litigation has arisen involving rights existing under the amendment proposed, it should be made on application to the court.<sup>70</sup>

65. *Mann v. LeMars*, 109 Iowa 251, 255, 80 N. W. 327.

66. *Low v. Pettengill*, 12 N. H. 337.

See *Webb et al. v. Strobach*, 143 Mo. App. 459, 127 S. W. 680.

67. *Mott v. Reynolds*, 27 Vt. 206, 208, per Redfield, C. J.

68. *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590, 598, two judges dissented and applied the rule relating to court records, citing *Wilkie v. Hall*, 15 Conn. 32.

Amendment sustained which was made by addition "from the personal knowledge of the members of the board." *Gilberts v. Rabe*, 49 Ill. App. 418, 421.

69. *Low v. Pettengill*, 12 N. H. 337, 340.

70. *Low v. Pettengill*, 12 N. H. 337, 340; *Gibson v. Bailey*, 9 N. H. 168, 176; *Pierce v. Richardson*, 37 N. H. 306, 311, per Bell, J.

§ 628. Court may order amendment—mandamus.

As stated, amendments may be compelled on order of court,<sup>71</sup> and *mandamus* will lie for this purpose.<sup>72</sup> The writ will lie to compel a town clerk to amend the record so that it would show the true fact of the appointment of plaintiff to office in place of another. In such case neither the incumbent nor the city are necessary or proper parties. The fact that amending the record would prepare the way for the plaintiff to displace the incumbent was held to be no objection to granting the relief prayed.<sup>73</sup> Where, under the law, the jurisdiction of the council in approving its journal, in the absence of any charge of fraud or bad faith, is final and conclusive, and the record of a previous meeting is read at a succeeding meeting under the rules adopted, and the council has corrected and disposed of the journal, the clerk has no further right, and there is no duty enjoined upon him by law to correct the same; *mandamus*, therefore, will not lie to compel him to do so. The court will not inquire into the accuracy of that record any more than it will into the motives which prompted members in voting as they did.<sup>74</sup>

§ 629. Amendment after lapse of time—estoppel—ex post facto.

Amendments have been sustained made several years after the original entries.<sup>75</sup> Where a record, made thirty-nine years previous, recites that the officer was "sworn into office," and it appeared that the town clerk was dead and the officer was chosen and acted as such, the record is competent to be submitted to the jury, as tending to

71. Bishop v. Cone, 3 N. H. 513.

72. Samis v. King, 40 Conn. 298, 305.

73. Farrell v. King, 41 Conn.

448. See Smith v. Moore, 38 Conn. 105.

74. State ex rel. v. Cleveland,

15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357.

75. Welles v. Battelle, 11 Mass.

477, 481.

show that the officer took the oath of office as prescribed by law.<sup>76</sup>

Ordinarily courts apply the principles of estoppel as strictly and with as much reason to municipalities and their inhabitants as to individuals.<sup>77</sup> In accordance with this principle, where a town record as originally made showed that a town voted to guarantee certain bonds in aid of a railroad, and it appeared that the company, in good faith, relying on the legality of the guarantee, incurred large expenditures of money, after the lapse of three years, the town will be estopped from availing itself of a correction of the record by the town clerk, showing that the vote had not been legally adopted, although the correction was made in pursuance of order of court.<sup>78</sup>

In one case the record of the village board did not show at the time the ordinance was violated that it had been legally passed. The record was subsequently amended so as to show the fact. Here it was contended that the defendant acquired some sort of vested right to immunity which could not be disturbed by the subsequent amendment, or that such subsequent amendment was *ex post facto* in its character and void as to him. But the court replied: "When defendant contemplated a violation of its provisions, ordinary prudence would require that he should ascertain whether it was in fact passed in the required mode. He is presumed to have known that the law authorized the board to amend its records by adding any omitted fact, and he could acquire no vested right that the prosecution for his wrong doing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought the village would not be able to prove its passage, he took the risk of such proof being made, and he had no right to insist that the proof should not be made."<sup>79</sup>

76. *Cass v. Bellows*, 31 N. H. 501, 511, 64 Am. Dec. 347.

77. *Society for Savings v. New London*, 29 Conn. 174, 192. Per Pardee, J.

78. *N. H. W. R. R. Co. v. Chatham*, 42 Conn. 465, 479.

79. *Gilberts v. Rabe*, 49 Ill. App. 418, 421.



§ 630. Inspection of municipal record.

Books, accounts, papers and documents which are public records are at all times open to inspection of citizens and taxpayers interested, subject, of course, to reasonable rules and regulations in regard to the time and manner of such examination, with a view to the safety of such records and the proper use of them by the public officials. Every officer appointed by law to keep records is merely in that relation a trustee of such records for the public who have an interest in the inspection of them. The fact that an examination of the books and records would cause worry and inconvenience or that the citizen making application for examination is politically hostile to the administration is no excuse for denial.<sup>80</sup>

Ordinarily, a general inspection of all documents in the hands of any corporate official at all times and from any motive, irrespective of the fact whether the applicant has any personal interest in such documents or any information to be derived therefrom, will be denied.<sup>81</sup>

But where application to inspect public documents has been made at a proper time and place, for a sound reason, under reasonable official regulations, and has been refused, *mandamus* may be invoked to compel inspection.<sup>82</sup>

80. *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

Right of inspection of public records. A charter provision that every officer and agent of the municipal corporation shall, at all times, when requested, submit his books and official papers to the inspection of the mayor or any member of the legislative council or to any person or committee appointed or authorized by the council to examine the same, held not to be exclusive so as to exclude examination by any citizen. *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

Right of grand jury to examine books held not exclusive so as to exclude examination by private individual. *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

81. *State ex rel. v. Cornell*, 35 How. Pr. (N. Y.) 31, reversing 32 How. Pr. (N. Y.) 149, 47 Barb. (N. Y.) 329.

82. *Inspection of records, illustrations*. *Rex v. Babb*, 3 Term Rep. 579; *Keokuk v. Merriam*, 44 Iowa 432.

Inspection of conveyances. *Stocknan v. Brooks*, 17 Colo. 248, 29 Pac. 746; *People ex rel. v. Reilly*, 38 Hun (N. Y.) 429.

Occasions in England which generally have required the exercise of the power of the court to enforce inspection of public documents, have been those where a party has sought evidence for the prosecution or defense of his rights in pending litigation. In such cases when the custodian was a party to the cause, the court usually intervened by rule, otherwise by *mandamus*. "But," as

29 Pac. 746; *People ex rel. v. Reily*, 38 Hun (N. Y.) 429.

Records of board of health. *Neville v. Board of Health*, 29 Abb. New Cases (N. Y.) 59.

Stockholders of corporation may inspect records and if denied may have *mandamus*. *Cockburn v. Union Bank*, 13 La. Ann. 289.

A director of a corporation has a right, at all reasonable times, to examine the records books and papers of the corporation. *People ex rel. v. Mott*, 1 How. Pr. (N. Y.) 247.

"As Lord Denman remarks, in *Rex v. Justices of Staffordshire*, 6 A. & E. 84, the court is by no means disposed to narrow its authority to enforce by *mandamus* the production of every document of a public nature in which any citizen can prove himself to be interested. For such person indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee." *State ex rel. v. Williams*, 41 N. J. L. 332, 334, 32 Am. Rep. 219.

"The principle seems to be, and very properly too, that the party asking the writ must have some interest at stake which renders the inspection necessary." *People*

*ex rel. v. Walker*, 9 Mich. 328, 330.

Denied where not shown that relator made his application for inspection at the office of the corporation during proper business hours nor any reason why it was not made there or why he was under any necessity of making it elsewhere. *People ex rel. v. Walker*, 9 Mich. 328, 331, per Christlancy, J.

Nature of interest of applicant fully considered in *State ex rel. v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219.

A citizen desiring to ascertain whether the provisions of the city charter in regard to licensing saloons have been observed, with a view of securing due obedience to the law, is entitled to an inspection of the letters of recommendation filed with the collector of taxes as the basis for the issue of pending licenses. *State ex rel. v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219.

Application should be limited to some legitimate purpose in respect of which the inspection becomes necessary. *Rex v. Merchant Tailors' Co.*, 2 B. & A. 115; *Rex v. Shelly*, 3 Term Rep. 141.

stated in a New Jersey case, "the existence of a suit was not a *sine qua non* for the exertion of the power."<sup>83</sup>

Some statutes provide for the inspection of all books, accounts and papers of municipal corporations or of those of any municipal department, or bureau thereof, and prescribe in case of refusal, on proper application that the court may by rule compel inspection.<sup>84</sup>

### § 631. Enforcing delivery of municipal records.

*Mandamus* is a proper remedy to compel an officer to perform a public duty.<sup>85</sup> However, it is not the proper remedy to try the title to an office (the title of which is in dispute) either in a direct or collateral proceeding.<sup>86</sup> But where the title to an office is uncontested or has been settled by adjudication, *mandamus* will lie to compel the delivery of books and papers belonging to the office.<sup>87</sup> Where an officer has been duly elected or appointed to office and has qualified and demands of his predecessor the records pertaining to the office, and is refused, ac-

83. *State ex rel. v. Williams*, 41 N. J. L. 332, 334, 32 Am. Rep. 219; *Rex v. Lucas*, 10 East 235; *Rex v. Allgood*, 7 Term Rep. 742; *Rex v. Tower*, 4 M. & S. 162; *Rex v. Justices of Leicester*, 4 B. & C. 891.

84. *Neville v. Board of Health*, 29 Abb. New Cases (N. Y.) 59.

Damages in case of refusal, etc., see *Jarvis v. Barnard*, 30 Vt. 492.

All city records open to inspection by express statute. *Stevenson v. Bay City*, 26 Mich. 44, 50.

Records of boards of county commissioners open to public inspection "at all times." Idaho Political Code (1901), § 1584.

85. *Eubank v. Broughton*, 98 Va. 499; *Mitchell v. Witt*, 98 Va. 459.

*Mandamus* to compel clerk of council to file veto message of mayor as of date received. *Baar v. Kirby*, 118 Mich. 392, 76 N. W. 754.

86. § 469 *ante*.

*State ex rel. Tracy v. Taaffe*, 25 Mo. App. 567; *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660; *State ex rel. v. Draper*, 48 Mo. 213; *Winston v. Moseley*, 35 Mo. 146; *State ex rel. v. Moseley*, 34 Mo. 375.

Title cannot be tested by injunction. *State ex rel. v. Withrow*, 154 Mo. 397, 55 S. W. 460.

87. *State ex rel. v. May*, 106 Mo. 488, 17 S. W. 660; *State ex rel. v. Trent*, 58 Mo. 571.

according to the weight of authority, *mandamus* is the only admissible writ.<sup>88</sup>

Some cases have affirmed, what others have denied, that either trover or replevin will lie in the name of the corporation to obtain possession of its public records.<sup>89</sup>

88. "A *mandamus* is the admissible writ to command public officers to produce and give up papers in their custody." *People ex rel. v. Treasurer*, 24 Mich. 468, 478. Per Campbell, J.

Proper by selectmen of town to compel the delivery to them of the books and papers pertaining to the office by persons who are alleged to have usurped the office. *Kimball v. Lamprey*, 19 N. H. 215, citing *Rex v. Wildman*, 2 Strange 879; *King v. Ingram*, 1 W. Bl. 50; *King v. Rounds*, 4 Ad. & El. 139; *Crawford v. Powell*, 2 Burrow 1013; *Rex v. Clapham*, 1 Wils. 305, 3 Bl. Com. 310; *Taylor v. Henry*, 2 Pick. (Mass.) 394; *First Parish v. Stearns*, 21 Pick. (Mass.) 148.

The proper mode is for the successor to take the oath of office, and demand of the former officer the records pertaining to the office, and if refused, then to apply for *mandamus*. *Commonwealth v. Athearn*, 3 Mass. 285.

*Mandamus* against treasurer of religious society whose term had expired, allowed on petition of the society. *St. Luke's Church v. Slack*, 7 Cush. (Mass.) 226.

Pretended intrusion into, or retention of, the office will not justify withholding the books, papers, etc., so as to compel the relator to resort to *quo warranto*.

*People ex rel. v. Kilduff*, 15 Ill. 492.

A committee appointed by a town to audit accounts of the overseers of the poor have no such property in the books, etc., as will authorize them to apply in their own names for *mandamus* to get possession of them. *Bates v. Plymouth*, 14 Gray (Mass.) 163.

School committee has no such property in the school registers as will enable them to maintain trespass for the taking of the same out of their possession. *Perkins v. Weston*, 3 Cush. (Mass.) 549.

89. Replevin allowed for records of school district in the name of the corporation against one not legally elected clerk. *School District v. Lord*, 44 Me. 374, 384, following *First Parish in Sudbery v. Stearns*, 21 Pick. (Mass.) 148, 151, where it was said that either trover or replevin will lie in the name of a parish for the recovery of the parish records.

Replevin denied. *State ex rel. v. Treasurer*, 24 Mich. 468, 478; *Keokuk v. Merriam*, 44 Iowa 432, 435; *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557, 30 Am. & Eng. Corp. Cas. 494.

Right to office cannot be determined by replevin. *Ibid.* *School District v. Lord*, 44 Me. 373; *Desmond v. McCarthy*, 17 Iowa 525.

## CHAPTER 15.

## GENERAL NATURE AND REQUISITES OF VALID MUNICIPAL ORDINANCES.

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| 632. Ordinances defined.   | 650. Ordinances must be enacted in good faith.                           |
| 633. Difference between ordinance and resolution.                                  | 651. Ordinances must be definite and certain.                            |
| 634. Illustrations as to when ordinance is necessary.                              | 652. Ordinances of cities of the same class may vary.                    |
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| 638. How ordinances differ from rules of procedure.                                | 656. Same—rule as applied to licenses.                                   |
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| 641. Same—penal and non-penal—general and special.                                 | 659. Same—wharves.   |
| 642. Ordinances may combine contractual and police regulations.                    | 660. Same—private property.  |
| 643. Force and effect of ordinances.   | 661. Same—regulating speed of trains.                                    |
| 644. Do ordinances differ as to force and effect from charter or statute?          | 662. Judicial limitation of operation of ordinances.                     |
| 645. Requisites of a valid ordinance.  | 663. Ordinances operating in public or particular places only.           |
| 646. Ordinances must conform to charter.   | 664. Ordinances applying to a part of the city only are valid.           |
| 647. Ordinances must conform to the statutes and general laws of the state.        | 665. Same — improvement ordinances.                                      |
| 648. Same—exceptions.  | 666. When do ordinances take effect?                                     |
| 649. Ordinances must harmonize with the public policy and common law of the state. | 667. Same—illustrative cases.  |
|  | 668. Same—contingency.   |
|  | 669. Expiration and suspension of ordinances.                            |

## § 632. Ordinance defined.

Local laws of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality, are, in this country, generally designated as ordinances. "By-laws" or "bye-laws" was the original designation. In England and in a few states such local laws are so named, the prefix "by" or "bye" signifying the place of habitation or local community with defined limits.<sup>1</sup>

1. A by-law is a rule obligatory over a particular district. Any rule of a permanent character, reasonably definite and consistent with the charter and general laws is a by-law. Per Parke, B., in *Gosling v. Velej*, 19 L. J. (N. S.) Q. B. 111; *Hopkins v. Swansea*, 4 M. & W. 620.

The word originally meant a law made in and for a "by" or "burh" (i. e., any fortified town or vill); regulations issued by the local authority for the regulation of a borough. But the word has now attained a wider significance, and includes all orders, ordinances, regulations, rules and statutes made by any authority subordinate to Parliament. 2 *Encyc. of the Laws of England*, 315.

"All regulations made by a corporate body, and intended not only to bind themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called a by-law." Per Lindley, L. J., in *London Assn., etc., v. London & India Docks Joint Com.*, 3 Ch. (1892), p. 252.

"By" was the Scandinavian word for town, and a by-law was hence a town law. 1 *Thompson, Corp.*, § 938.

In the shires, where the Danes acquired a firm foothold, the township was often called a "by," and it had the power of enacting its own "by-laws," or town-laws, as New England townships have to-day. J. Fiske, *Amer. Pol. Ideas*, p. 46.

**By-law in New England.** The term by-law "has a peculiar and limited signification; being used to designate the orders and regulations, which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of municipal and other *quasi* corporations; but a broad distinction has always been made between the authority of a corporation to make by-laws and the general power of making laws." Per Shaw, C. J., in *Com. v. Turner*, 1 *Cush. (Mass.)* 493, 496.

The words "by-laws" and "ordinances" are often used interchangeably in statutes and charters, as that upon "the passage of any by-law or ordinance," the yeas and nays shall be called and recorded.<sup>2</sup>

**Byelaw defined in the English law.** A by-law (Scotch birlaw or burlaw, i. e., burghlaw) denotes etymologically a law for the regulation of a "by" or township. In early times, such local laws appear to have been in force in most communities, deriving their sanction from charter, custom or prescription. Indeed the power of making byelaws for the regulation of its domestic affairs is at common law inherent in any corporation (Hob. 211), and such laws are binding upon the members of the corporation unless they are inconsistent with or contrary to the common or statute law or charter of incorporation (Rex v. Cutbush, 4 Burr. 2204; Holbyn v. R., 2 Bro. P. C. 329; Rex v. Cambridge, 2 Chitty 144).

There exists also, it would seem, an implied power of enforcing such byelaws by the imposition of penalties (Kyd on Corporations; Hall v. Nixon, L. R. 10 Q. B. 152, 39 J. P. 341, 44 L. J. M. C. 51, 32 L. T. 87, 23 W. R. 612).

In the case of modern authorities, however, the power to make and enforce byelaws depends upon statute; and we may for present purposes regard a byelaw as "an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied

by some sanction or penalty for its non-observance." See *Kruse v. Johnson*, 2 Q. B. 91, 62 J. P. 469, 67 L. J. Q. B. 782, 78 L. T. 647, 46 W. R. 630, 14 T. L. R. 416, Per Lord Russell, C. J.

A byelaw has also been defined as "a local law made with due legal obligation by some authority less than the Sovereign and Parliament in respect of a matter specially referred to that authority." Arnold's *Mun. Corp.* (5th Ed. London), p. 47.

Ordinance means "a local law prescribing a general and permanent rule." Per Elliott, J., in *Citizens' Gas and M. Co. v. Elwood*, 114 Ind. 332, 336, 16 N. E. 624.

"An ordinance is the law of the inhabitants of the municipality." *Mason v. Shawneetown*, 77 Ill. 533, 537.

For other definitions, see *Oakland v. Oakland Water F. Co.*, 118 Cal. 160, 50 Pac. 277; *State v. Swindell*, 146 Ind. 527, 45 N. E. 700, 58 Am. St. 375; *State v. Omaha, etc. R. R. Co.*, 113 Iowa 30, 84 N. W. 983; *Farnsworth v. Pawtucket*, 13 R. I. 82; *Kepner v. Com.*, 40 Pa. St. 124; *Robinson v. Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625.

2. *Tracey v. People*, 6 Colo. 151, 153, 4 Am. & Eng. Corp. Cas. 373; *National Bank of Commerce v. Grenada*, 44 Fed. 262; *Bills v. Goshen*, 117 Ind. 221, 225, 20 N. E. 115; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 112, 10 Atl. 809.

Occasionally the general term ordinance is used in a broad sense, so as to embrace municipal charters and statutes relating to the government of the municipality. However, such use is inaccurate, for ordinances are not, in the constitutional sense, public laws, but mere local regulations or by-laws, operating in a particular locality.<sup>3</sup>

3. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Shuttuck v. Smith*, 6 N. D. 56, 69 N. W. 5.

Various uses of the term ordinance—Ordinance of Parliament, a temporary act of parliament.

Ordinance of the Forest, an English statute relating to the forest.

Ordinance of the Saladin Tithe, an English law of 1188, levying a particular tax, and one of the earliest attempts to tax personal property.

Self-denying ordinance, an early English ordinance passed in 1645, requiring members of parliament holding military or civil office to vacate such positions at the expiration of forty days.

Northwest ordinance, or the ordinance of 1787, being the law for the territorial government of the Northwestern territory. *People ex rel. v. Thompson*, 155 Ill. 451, 473; *Dixon v. People*, 168 Ill. 179, 39 L. R. A. 116; *Allen County Comrs. v. Simons*, 129 Ind. 193, 28 N. E. 420, 13 L. R. A. 512.

Ordinance of Nullification, an ordinance passed by a state convention of South Carolina, November 24, 1832, declaring void certain acts of the Congress levying duties and imposts on imports and threatening withdrawal of the state from the Union in case of attempt to enforce such acts ex-

cept in the courts of that state. This ordinance was repealed by the state convention March 16, 1833.

Ordinance of Secession. The term ordinance was applied to the various acts of secession adopted by the Confederate states. In this relation it was used in the sense of organic provisions, although in the main they were mere enactments by the legislatures of these several states, but in some instances the people were supposed to have given their consent.

Colony Ordinance of 1647, a law enacted by the Massachusetts Colony under which the legislature has the right to appropriate, or to grant to a city or town the right to appropriate, the waters of great ponds for domestic purposes, for the extinguishment of fires, and for other like municipal or public uses. The ordinance is still in force in a modified form. *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 556, 18 N. E. 465. Notes as to, 5 L. R. A. 179, and 13 L. R. A. 255.

Massachusetts Colony Ordinance of 1641, fixing the right of property upon salt water. *Barker v. Bates*, 13 Pick. (Mass.) 255; *Mayhew v. Norton*, 17 Pick. (Mass.) 357, 359; *Weston v. Sampson*, 8 Cush. (Mass.) 347.



### § 633. Difference between ordinance and resolution.

As the terms are ordinarily used in charters, there is a distinction between an ordinance and a resolution. The corporation cannot accomplish by an order or resolution that which, under its charter, can be done only by an ordinance.<sup>4</sup> Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing the act. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character only. It may be stated as a general rule that matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance, while all acts that are done in its ministerial capacity and for a temporary purpose may be put in the form of resolutions.<sup>5</sup> Municipal charters generally prescribe that

4. *California*. Pimental v. San Francisco, 21 Cal. 351.

*Colorado*. Central v. Sears, 2 Colo. 588.

*Connecticut*. State v. Tryon, 39 Conn. 183.

*Georgia*. Bearden v. Madison, 73 Ga. 184.

*Illinois*. People v. Crotty, 93 Ill. 180.

*Indiana*. Anderson v. O'Connor, 98 Ind. 168.

*Iowa*. Starr v. Burlington, 45 Iowa 87.

*Kansas*. Newman v. Emporia, 32 Kan. 456, 4 Pac. 815.

*Missouri*. Nevada, to use, v. Eddy, 123 Mo. 546, 27 S. W. 471; Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643; Thompson v. Boonville, 61 Mo. 282; Springfield v. Knott, 49 Mo. App. 612; Cape Girardeau v. Fougau, 30 Mo. App. 551.

*New Jersey*. Paterson v. Barnet, 46 N. J. L. 62, 66; Hunt v. Lam-

bertville, 45 N. J. L. 279; State v. Bayonne, 35 N. J. L. 335.

*Texas*. Brand v. San Antonio (Tex. Civ. App. 1896), 37 S. W. 340.

*Washington*. Burmeister v. Howard, 1 Wash. Ter. 207.

*United States*. Board of Mayor, etc. v. East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

5. Alma v. Guaranty Savings Bank, 19 U. S. App. 60 Fed. 203, 622, per Thayer, J.; Blanchard v. Bissell, 11 Ohio St. 96, 103; State v. Bayonne, 35 N. J. L. 335; Grimmel v. Des Moines, 57 Iowa 144.

Ordinance distinguished from resolution. "A municipality may only legislate through the passage of an ordinance and not by the passage of mere resolutions." People ex rel. v. Mount, 186 Ill. 560, 571, 58 N. E. 360.

Acts of legislation which prescribe a permanent rule of con-

an ordinance must be signed by the mayor, unless passed over his veto, while, ordinarily, a resolution need not be, as the passage of the latter is usually not a legislative act.<sup>6</sup>

Where the mayor is a constituent part of the legislative power his approval of all legislative acts is necessary to their validity.<sup>7</sup>

duct of government and which are to have a continuing force and effect must be established by ordinance. *C. & N. Pac. R. R. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *Altamont v. B. & O. S. W. R. R.*, 184 Ill. 47, 56 N. E. 340; *Baltimore & O. S. W. Ry. Co. v. Altamont*, 84 Ill. App. 274, 277; *Nazworthy v. Sullivan*, 55 Ill. App. 51; *C. & N. P. R. R. Co. v. Chicago*, 174 Ill. 455.

A resolution is designed to reach special and individual cases. 1 *Thompson, Corp.*, § 937.

"An order forbidding fireworks in the streets is an ordinance, one appropriating money for celebrating a holiday is a resolution." *Century Dict. & Cyc.*, tit. "Ordinance."

"Every legislative act \* \* \* shall be by ordinance." *Charter of Consolidated City and County of San Francisco*, art. XI, § 8; *Paterson v. Barnet*, 46 N. J. L. 62, 66; *Chicago v. McCoy*, 136 Ill. 344, 351.

A charter provision "that it shall not be necessary for any order or resolution of either branch, or to which the concurrence of both branches of the council may be required, to be presented to the mayor for his approval, but the same shall be binding for all purposes; the councils

may transact business by order or resolution; and every such order or resolution shall be filed in the archives of the city, and shall be evidence for the purposes therein contained," does not authorize legislation by order or resolution, but merely refers to such current business as may be properly done by order or resolution. *Shaub v. Lancaster City*, 156 Pa. St. 362, 365, 26 Atl. 1067, 21 L. R. A. 691.

6. *Burlington v. Dennison*, 42 N. J. L. 165, disapproving *Kepner v. Commonwealth*, 40 Pa. St. 124, saying that it is contrary to all other adjudged cases, and can only be sustained on the peculiar and ambiguous phraseology of the charter of the City of Harrisburg. *People ex rel. v. Mount*, 186 Ill. 560, 574, 58 N. E. 360.

7. *C., R. I. & P. R. R. Co. v. Council Bluffs*, 109 Iowa 425, 80 N. W. 564; *Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153; *Thompson v. Boonville*, 61 Mo. 282; *Irvin v. Devors*, 65 Mo. 625; *Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643; *State v. Butler*, 178 Mo. 272, 77 S. W. 560; *Crutchfield v. Warrensburg*, 30 Mo. App. 456.

A general ordinance cannot legally provide that legislative power may be exercised by resolution, for an ordinance cannot

Where the resolution is passed with all the formality of an ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or resolution.<sup>8</sup>

### § 634. Illustrations as to when ordinance is necessary.

Under particular charter provisions, ordinances have been held necessary in performing the following legisla-

change the charter. *Cape Girardeau v. Fougau*, 30 Mo. App. 551.

A resolution may be ratified by an ordinance. *State ex rel. v. Cowgill, etc. Milling Co.*, 156 Mo. 620, 57 S. W. 1008.

Where a charter requires every resolution affecting the interests of the city to be presented to the mayor for his approval a resolution authorizing the removal of night soil from the city must be presented to the mayor for his signature. *Dey v. Jersey City*, 19 N. J. Eq. 412, 416.

8. *California*. *Pollock v. San Diego*, 118 Cal. 593; *Gas Co. v. San Francisco*, 6 Cal. 190.

*Kentucky*. *Gleason v. Barnett*, 22 Ky. L. Rep. 1660, 61 S. W. 20.

*Indiana*. *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.

*Louisiana*. *First Municipality v. Cutting*, 4 La. Ann. 336.

*Minnesota*. *Steenerson v. Fontaine*, 106 Minn. 225, 119 N. W. 400.

*Missouri*. *Tipton v. Norman*, 72 Mo. 380; *Springfield v. Knott*, 49 Mo. App. 612; *Manufacturing Co. v. Schell City*, 21 Mo. App. 175; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088.

*Nebraska*. *McGavock v. Omaha*, 40 Neb. 64.

*New Jersey*. *Green v. Cape May*, 41 N. J. L. 45.

*New York*. *Drake v. Railroad Co.*, 7 Barb. (N. Y.) 508.

*Texas*. *San Antonio v. Micklejohn*, 89 Tex. 79.

*Wisconsin*. *Green Bay v. Brauns*, 50 Wis. 204.

*United States*. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573; *Crebs v. Lebanon*, 98 Fed. 549; *Alma v. Guaranty Sav. Bank*, 19 U. S. App. 622; *Roberts v. Paducah*, 95 Fed. 62; *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854.

A resolution not approved by the mayor has not the effect of an ordinance. *Central v. Sears*, 2 Colo. 588; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Wain v. Philadelphia*, 99 Pa. St. 330, 337.

A joint resolution of councils, directing the opening of a street laid down on one of the public plans of the city, held in Pennsylvania to be of same force as an ordinance for that purpose. *Sower v. Philadelphia*, 35 Pa. St. 231, 236.

A by-law may be enacted in the form of a resolution. *Thompson Corp.*, § 936.

tive acts: Providing for the issuing of bonds for the construction of sewers;<sup>9</sup> ordering the grading a street;<sup>10</sup> changing grade of street;<sup>11</sup> street improvements;<sup>12</sup> reconstruction of street;<sup>13</sup> altering the width of a sidewalk;<sup>14</sup> making contracts for the employment of legal counsel;<sup>15</sup> appointing a commissioner to assess damages;<sup>16</sup> fixing the permanent compensation of municipal officers;<sup>17</sup> changing salaries fixed by ordinance;<sup>18</sup> changing ward lines;<sup>19</sup> amending or repealing an ordinance;<sup>20</sup> exercising the power of licensing;<sup>21</sup> public work;<sup>22</sup> con-

9. *State v. Barnet*, 46 N. J. L. 62.

10. *Clay v. Mexico*, 92 Mo. App. 611; *State v. Bayonne*, 35 N. J. L. 335; *Koeppen v. Sedalia*, 89 Mo. App. 648.

11. *Kroffe v. Springfield*, 86 Mo. App. 530; *Powell v. Excelsior Springs*, 138 Mo. App. 121, 120 S. W. 106; *Mandlin v. Trenton*, 67 Mo. App. 456.

12. *Indianapolis v. Miller*, 27 Ind. 394; *Nevada to use v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853; *Alton v. Job*, 103 Ill. App. 378; *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

13. *Ritterskamp v. Stifel*, 59 Mo. App. 510; *Farrell v. Rammekamp*, 64 Mo. App. 425.

14. *Cross v. Morristown*, 18 N. J. Eq. 305.

15. *Bryan v. Page*, 51 Tex. 532; *State ex rel. v. Dierkes*, 214 Mo. App. 578, 113 S. W. 1077.

16. *State v. Bergen*, 33 N. J. L. 39, 72.

17. *Central v. Sears*, 2 Colo. 588; *Walker v. Evansville*, 33 Ind. 393; *Brazil v. McBride*, 69 Ind. 244; *Smith v. Com.*, 41 Pa. St. 335.

18. *Hisey v. Charleston*, 62 Mo. App. 381.

19. *McCulley v. Elizabeth*, 66 N. J. L. 555, 49 Atl. 686; *Cascaden v. Waterloo*, 106 Iowa 678, 77 N. W. 333.

20. *Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333; *Young v. St. Louis*, 47 Mo. 492.

"An ordinance cannot be amended, suspended or repealed by a resolution. The acts which amend, modify or repeal a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion." *People ex rel. v. Mount*, 186 Ill. 560, 578, 579, 58 N. E. 360; *Bloomington & N. Ry. Co. v. Bloomington*, 123 Ill. App. 639; *Steenerson v. Fontaine*, 106 Minn. 225, 119 N. W. 400; *Jones v. McAlpine*, 64 Ala. 511.

21. This is a subject which, in its nature, requires legislation of a permanent character and of continuing force and effect. The fact that the license, under the general law, can only extend for a limited time, as, for example, one

struction of sewers;<sup>23</sup> enforcements of assessments to meet the cost of public improvements;<sup>24</sup> exempting property from taxation;<sup>25</sup> and conferring privileges and franchises under a power to grant by ordinances.<sup>26</sup>

### § 635. Same—creating offices and situations.

Under some charters every office or situation under the municipal government or its departments must be created by ordinance, except where the charter itself or some legislative act applicable, creates the office or position.<sup>27</sup>

Ordinarily, as mentioned elsewhere, the officer possesses no constitutional or charter prerogative to appoint subordinates, independent of the action of the legislative authority, and by all authorized legislation relating thereto he must be governed, not only in making the appointment but in all that is incident to the exercise of the power.<sup>28</sup>

Generally the power to create offices and situations is vested in the council or governing legislative body,<sup>29</sup> and,

year, cannot change the rule. *People ex rel. v. Mount*, 186 Ill. 560, 58 N. E. 360.

22. *Dickey v. Holmes*, 109 Mo. App. 721.

23. *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86.

24. *Martin v. Oskaloosa*, 126 Iowa 680, 99 N. W. 557; *Hedge v. Oskaloosa*, 126 Iowa 680, 99 N. W. 557; *Ross v. Oskaloosa*, 126 Iowa 680, 99 N. W. 557.

25. *Garrison v. Lauren*, 55 S. C. 551, 33 S. E. 577.

26. Nor can ordinance making such grant be amended by resolution. *Board of Mayor, etc. v. East Tennessee Tel. Co.*, 115 Fed. 304, 53 C. C. A. 132.

27. See *State v. Kennon*, 7 Ohio St. 546.

28. § 430 *ante*.

29. *Somerville v. Wood*, 129

Ala. 369, 30 So. 280; *Anderson v. Camden*, 58 N. J. L. 515, 33 Atl. 846.

Where the charter authorizes the city council to fix the compensation of its members this may be done by ordinance although no provision for compensation existed at the election of the councilmen. *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

When salary cannot be fixed by ordinance under particular provisions. *Taylor v. Tacoma*, 8 Wash. 174, 35 Pac. 584.

The board of supervisors "when authorized to do so by ordinance," may appoint additional clerks. *Charter San Francisco*, Art. II, Ch. 1, § 4; *Statutes and Amend. to Codes of Cal.* (1899), p. 244.

of course, the charter method in this respect, as well as the mode therein prescribed for the election or appointment of officers and persons to public positions, must be observed.<sup>30</sup> An office or position which must continue to exist until abolished by ordinance can only be created by the exercise of a power essentially legislative—a power which the council or governing legislative body alone possesses under the charter, which cannot, as pointed out elsewhere,<sup>31</sup> be delegated. It has been held that “the legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number—offices which the power creating them is incompetent to abolish.”<sup>32</sup> But day laborers, of course, are not included, and under some charters this class of employees is the only exception.<sup>33</sup> Sometimes ordinary clerical assistants and other miscellaneous employees may be appointed without the creation

30. *Illinois*. Launtz v. People, 113 Ill. 137; People v. Weber, 89 Ill. 347; Home Ins. Co. v. Tierney, 47 Ill. App. 600.

*Massachusetts*. Com. v. Allen, 128 Mass. 308; Saunders v. Lawrence, 141 Mass. 380, 5 N. E. 840.

*Maine*. Bearce v. Fassett, 34 Me. 575.

*Michigan*. Baker v. Port Huron, 62 Mich. 327, 28 N. W. 913.

*New Jersey*. State (Clarke) v. Thornton, 49 N. J. L. 349, 8 Atl. 509; O'Connor v. Walsh, 82 N. Y. S. 499, 83 App. Div. 179.

*Ohio*. State v. Bryson, 44 Ohio St. 457, 8 N. E. 470.

*Tennessee*. Lawrence v. Ingersoll, 88 Tenn. 52, 62, 6 L. R. A. 308, 17 Am. St. Rep. 870, 12 S. W. 422.

*Vermont*. Stone v. Small, 54 Vt. 498.

Ordinance creating office, as city scavenger need not specify manner in which his work shall be done. Ouray v. Corson, 14 Colo. App. 345, 59 Pac. 876.

Vote required in creating under particular charter. Kirkham v. Russell, 76 Va. 956, 959.

Where the law requires a resolution employing a clerk to be signed by the mayor, failure nullified the act. People v. Schroeder, 12 Hun (N. Y.) 413.

Where power to appoint is vested by charter in the council, an ordinance is void which confers such power on the mayor and council. State (Volk) v. Newark, 47 N. J. L. 117.

31. See §§ 384-386 *ante*.

32. Ford v. Harbor Commissioner, 81 Cal. 19, 37.

33. Municipal Code of St. Louis (1901, McQuillin), p. 385, § 98.

by ordinance of the positions which they occupy. However, this question must be determined by the provisions of the particular charter.<sup>34</sup>

The wise and salutary rule, rigidly enforced by the courts, which forbids the payment of a salary or compensation to the officer unless the law so expressly provides and title is secured in accordance with law,<sup>35</sup> and

34. Sometimes council may elect or appoint. *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *Com. v. Pittsburgh*, 14 Pa. St. 177, 182; *Kirkham v. Russell*, 76 Va. 956.

Cannot appoint officer, as pound keeper, unless expressly authorized by charter. *White v. Tallman*, 26 N. J. L. 67.

The appointment of an agent of fortifications by the secretary of war, there being no act of congress conferring that power upon that officer, is irregular. *United States v. Maurice*, 2 Brock. (U. S.) 96.

Town trustee may employ broker, to sell bonds. *Reed v. Orleans*, 1 Ind. App. 25, 27 N. E. 109. Likewise, city comptroller. *New York v. Sands*, 105 N. Y. 210, 11 N. E. 820. Compare *Armstrong v. Ft. Edwards*, 84 Hun (N. Y.) 261, 32 N. Y. S. 433; *People v. Smithville*, 85 Hun (N. Y.) 114, 32 N. Y. S. 668.

Agent may be employed, without formal ordinance, by-law or resolution, unless so required by law. *Wilt v. Redkey*, 29 Ind. App. 199, 64 N. E. 228.

Without express charter or ordinance authority neither the mayor nor city solicitor can employ an attorney. *Fletcher v. Lowell*, 15 Gray (81 Mass.) 103.

So, to employ an attorney,

the president of a village must have express authority. *Mark v. West Troy*, 69 Hun (N. Y.) 442, 23 N. Y. S. 422.

No liability exists on an implied contract to pay reasonable value of professional services rendered by attorney (not city attorney) in advising the mayor or aldermen, where employment is not authorized or ratified by vote of council. *Bosard v. Grand Forks*, 13 N. D. 587, 102 N. W. 164.

35. Fatal defects in the election or appointment of the officer may deprive him of compensation. *Rothrock v. School District*, 133 Pa. St. 487, 19 Atl. 483; *Phelon v. Granville*, 140 Mass. 386, 5 N. E. 269; *Commonwealth v. Allen*, 128 Mass. 308.

It has been held that an officer cannot recover compensation for services rendered under a statute held unconstitutional. *Meagher v. County*, 5 Nev. 244; *Central v. Sears*, 2 Colo. 588; *Lancaster v. Fulton (Pa.)*, 24 W. N. C. 401; *Smith v. Commonwealth*, 41 Pa. St. 335.

No implied promise or liability to pay officers will arise. *Riley v. Kansas City*, 31 Mo. App. 439; *Garnier v. St. Louis*, 37 Mo. 554.

For a public officer is not entitled to compensation by virtue of a contract express or implied.

which denies extra compensation, without express legal provision being made therefor<sup>36</sup> (fully considered elsewhere), is often applied to deputies, assistants and subordinates in the municipal service.

As mentioned elsewhere the ordinance may confer authority upon the officer to appoint such additional help as may be required for the efficient working of his department, or, as many be necessary, where the character of such help is specified by naming in terms the positions, and designating the compensation for each situation. Such ordinance does not constitute a delegation of legislative power. The ordinance itself creates the situation, and whether it be technically an office or a mere place, the officer by filling it simply supplies an incumbent or person (as in his judgment the demands of the public service may require) for a position already created by legal authority.<sup>37</sup> An office or position may exist

The right of compensation can only exist, if at all, as a creation of law and as an incident to the office. *Givens v. Daviess County*, 107 Mo. 603, 608, 609, 17 S. W. 998.

**36. Extra Compensation denied.** § 525 *ante*.

*Carroll v. St. Louis*, 12 Mo. 444; *Chamberlain v. Kansas City*, 125 Mo. 430, 28 S. W. 745; *State ex rel. v. Holladay*, 67 Mo. 64; *Le-moine v. St. Louis*, 120 Mo. 419, 25 S. W. 537.

The fact that the salary is inadequate does not change the rule. A promise to pay the officer extra fees beyond that established by law will not bind the corporation. *Decatur v. Vermillion*, 77 Ill. 315; *Heslep v. Sacramento*, 2 Cal. 580.

**37.** *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524, in appli-

cation of rule to policemen, provided by state statute.

An act conferring on county commissioners the power to authorize the employment of additional help in certain offices does not constitute a delegation of legislative power. *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974.

So, a statute conferring on the attorney general the authority to appoint some reputable attorney for the performance of certain duties appertaining to the office of the attorney general, with like effect as if done by the officer, does not confer the power to create a new office. *State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

So, a statute which provides that whenever the county attorney of any county shall be unable or shall neglect or refuse to enforce the provisions of certain



without an incumbent.<sup>38</sup> Sometimes the legislative power to provide situations under the city government and to create new officers does not of itself include the power to appoint,<sup>39</sup> but oftentimes the power of appointment is an exclusive prerogative of the mayor in case of an officer, or of an officer in case of an assistant or subordinate. This rule results from express charter or legislative provisions applicable,<sup>40</sup> and is an exception to the rule sometimes laid down that, where a public office is of legislative creation the legislature can modify, control or abolish it, and within these powers is embraced the right to change the mode of appointment to office.<sup>41</sup>

### § 636. When action may be taken by resolution—illustrations.

The general rule is that, where a charter commits the decision of the matter to the council or legislative body alone, and is silent as to the mode of its exercise, ordinarily the decision may be evidenced by resolution.<sup>42</sup> But

laws in his county, the attorney general "may appoint as many assistants as he shall see fit," to enforce such laws, has been sustained. *In re Gilson*, 34 Kan. 641, 9 Pac. 763.

38. *People v. Stratton*, 28 Cal. 382

39. *State v. Denny*, 118 Ind. 382, 21 N. E. 252; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267; *State v. Kennon*, 7 Ohio St. 546; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

40. *Municipal Code of St. Louis* (1901, McQuinn), p. 384, sec. 97.

41. *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

42. *Eichenlaub v. St. Joseph*, 113 Mo. 395, 402, 21 S. W. 8; *Halsey v. Rapid Transit Co.*, 54 N. J.

L. 102, 20 Atl. 859; *Butler v. Passaic*, 44 N. J. L. 171; *Green v. Cape May*, 41 N. J. L. 45; *State v. Jersey City*, 27 N. J. L. 493; *Pollock v. San Diego*, 118 Cal. 593, 50 Pac. 769; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849; *Burlington v. Dennison*, 42 N. J. L. 165; *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *Kepner v. Commonwealth*, 40 Pa. St. 124; *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Chicago, etc. R. R. Co. v. Chicago*, 124 Ill. 439; *Chicago v. McKechney*, 91 Ill. App. 442.

**Resolution, when.** Where a state constitution requires the legislature to approve or reject a municipal charter as a whole, without power of alteration, held

it does not necessarily follow that, because the charter does not, in express terms, require an act to be done by an ordinance it may, therefore, be effected by a mere resolution. On the contrary, where the requirement that the corporate act should be done by ordinance is implied by necessary inference (as where it is a clear legislative act), a resolution is not sufficient, but an ordinance is indispensable.<sup>43</sup>

Under particular charter provisions, resolutions have been held sufficient in the following instances: For the purchase of fire department apparatus;<sup>44</sup> construction of a sewer;<sup>45</sup> acceptance of a dedication;<sup>47</sup> prescribing salary of officer;<sup>48</sup> fixing the amount of a license previously authorized to be imposed;<sup>49</sup> fixing a license fee from time to time, under general ordinance;<sup>50</sup> ordering street improvements;<sup>51</sup> directing city agents to make named contracts and to appoint municipal agents; confirming prior corporate acts;<sup>52</sup> directing conveyance of

approval may be by joint resolution and need not be by bill, signed by the governor. *Brooks v. Fisher*, 79 Cal. 173, 21 Pac. 652.

A resolution will be sufficient for the performance of a ministerial act. *Quincy v. C., B. & Q. Railroad Co.*, 92 Ill. 21.

Mayor need not approve resolution, when. *Burlington v. Denison*, 42 N. J. L. 165.

43. *People ex rel. v. Mount*, 186 Ill. 560, 573, 58 N. E. 560; *Atchison Board of Education v. DeKay*, 148 U. S. 591, 599, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573; *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815.

**Vote required.** Where the charter requires a resolution to be adopted by a majority vote such vote must be given to render the resolution legal. *Casca-*

*den v. Waterloo*, 106 Iowa 673, 77 N. W. 333.

44. *Green v. Cape May*, 41 N. J. L. 45.

45. *State v. Jersey City*, 27 N. J. L. 493.

47. *Green Bay v. Brauns*, 50 Wis. 204.

48. *Burlington v. Insurance Co.*, 31 Iowa 102.

49. *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053.

50. *Commissioners v. Silvers*, 22 Ind. 491; *Indianapolis v. Imberry*, 17 Ind. 175; *Delphi v. Evans*, 36 Ind. 90; *Buckley v. Tacoma*, 9 Wash. 253; *Waco v. Prather*, 90 Tex. 80, 37 S. W. 312.

51. *Alton v. Mulledy*, 21 Ill. 76; *Egan v. Chicago*, 5 Ill. App. 70.

52. *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190.

property;<sup>53</sup> for waiving time of performance of contract;<sup>54</sup> providing for construction of sidewalks;<sup>55</sup> proposition for amendment of municipal charter;<sup>56</sup> election of officers by a board of mayor and aldermen;<sup>57</sup> proposition of third persons to purchase refunding bonds may be acted upon either by ordinance or resolution;<sup>58</sup> proposition to test sense of voters on the subject of issuing water works or electric light bonds;<sup>59</sup> the designation of the kind of meters to be used by those who take water from the public supply;<sup>60</sup> contract for the construction of water works for a village in Michigan may be by resolution.<sup>61</sup>

The question whether the particular act is to be taken by ordinance or resolution is further considered in appropriate places throughout this work.

### § 637. How ordinances differ from regulations, orders, resolutions, etc.

Sometimes the word ordinance is used interchangeably with by-laws, resolutions, regulations, orders, etc.<sup>62</sup> But there is a distinction in these words in ordinary usage.

**Regulation** is the most general of them all, meaning a rule of order prescribed by a superior or competent authority, relating to the actions of those under its con-

53. *Morgan v. Johnson*, 106 Fed. 452, 45 C. C. A. 421.

54. *Hubbard v. Norton*, 28 Ohio St. 116.

55. *Meek v. Collinwood*, 30 Ohio Cir. Ct. R. 63.

56. *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827.

57. *Huey v. Jones*, 140 Ala. 479, 37 So. 193.

58. *Roberts & Co. v. Paducah*, 95 Fed. 62.

59. *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868.

60. *Anderson v. Village of Berwyon* 135 Ill. App. 8.

61. *Lewick v. Glazier* 116 Mich. 493, 74 N. W. 717, 5 Det. Leg. N. 27.

62. *State (Hunt) v. Lambertville*, 45 N. J. L. 279, 282; *Alma v. Guaranty S. Bank*, 19 U. S. App. 622; *Lincoln v. Sun Vapor Light Co.*, 19 U. S. App. 431.

"Every legislative act of the municipal assembly shall be by ordinance or resolution." *Charter Greater New York*, ch. 1, § 39; *Laws of N. Y.* (1897), p. 14.

trol; a governing direction; precept; law (as police regulations); any rule for the ordering of affairs, public or private. In this sense it becomes the generic term from which all others are defined, specified or differentiated. More specifically, a regulation is a rule prescribed by a municipality, corporation or society for the conduct of third persons dealing with it, as distinguished from a by-law or ordinance.<sup>63</sup>

By-law, as above stated, was the original designation for ordinance, is the word employed in the English law, and to a limited extent, in this country. But the term is also applied to standing rules, adopted by public or private corporations, societies, or associations, relating to their own internal organization and the conduct of their officers and members.<sup>64</sup>

Ordinance, although sometimes used in a broad sense so as to include all forms of regulations by civil authority, even acts of Parliament, in this country is usually confined to legislation of municipal corporation. The term is sometimes applied to all sorts of rules and by-laws of the municipality.<sup>65</sup>

Resolution is said to be only a less solemn or less usual form of an ordinance.<sup>65a</sup> "It is an ordinance still if it is anything intended to *regulate* any of the affairs of the corporation."

Ordinance, then, according to the Supreme Court of Pennsylvania, is the generic term for all acts of council

63. Century Dict. & Cyc., tit., "Regulation;" Compton v. Van Volkenburg, 34 N. J. L. 134; State v. Overton, 24 N. J. L. 441, 61 Am. Dec. 671; Morris, etc. R. R. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; Wilmington Bank v. Wollaston, 3 Harr. (Del.) 90.

64. By-law and regulation distinguished by Judge Thompson, 1 Thompson, Corp., § 937.

By-law defined. Kirkpatrick v.

United Presbyterian Ch., 63 Iowa 372; Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; Drake v. Hudson River Co., 7 Barb. (N. Y.) 539.

65. "Ordinary usage shows this, and it may be found illustrated in Willcock on Corporations, 73;" Kepner v. Commonwealth, 40 Pa. St. 124, 129, 130.

65a. Sawyer v. Lorenzen, Ia. (1910), 127 N. W. 1091.

affecting the affairs of the corporation, and no distinction can be made between them founded on the difference of degree in which they affect those affairs.<sup>66</sup>

Order. Sometimes the word resolution or order to enter into contracts is used in a restricted sense.<sup>67</sup> Thus an order of the council that certain street work be done was held, under a particular charter, not to be an ordinance respecting the necessity of following the charter style and form and publication.<sup>68</sup>

### § 638. How ordinances differ from rules of procedure.

Rules of procedure or rules of council are mere rules of practice of the council or governing legislative body itself in its deliberations, passed by virtue of an authority inherent in all associated functionaries, and implied when not expressly given; and establishing the forms under which it acts in the process of passing ordinances, and expressing the corporate will in all matters within the scope of its legitimate powers. These rules cannot be considered ordinances, but are merely forms of procedure for passing ordinances, and exercising the powers of the corporation.<sup>69</sup>

66. *Kepner v. Commonwealth*, 40 Pa. St. 124, 130.

67. *Tracy v. People*, 6 Colo. 151, 153, 4 Am. & Eng. Corp. Cas. 373.

68. *Napa v. Easterby*, 76 Cal. 222, 228, 18 Pac. 253; *People v. Linden*, 107 Cal. 94, 40 Pac. 115; *People v. Counts*, 89 Cal. 15, 26 Pac. 612.

Differences as to "ordinances," "resolutions" and "orders" as to publication. *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325; *Elmendorf v. New York*, 25 Wend. (N. Y.) 693.

"Order" defined. *Tinkham v. Greer*, 11 Kan. 299; *People v. Williams*, 64 Cal. 87, 27 Pac. 939.

"Order" of board of health. *New York Health Dept. v. Knoll*, 70 N. Y. 530.

Order to be published, when. *State v. Pierce*, 35 Wis. 93.

An order by a council, awarding a contract for the year's printing, is not an ordinance or resolution such as the charter requires to be placed in the clerk's office, and there remain three days before going into effect. *Galveston v. Morton*, 58 Tex. 409.

69. *Kepner v. Commonwealth*, 40 Pa. St. 124, 130.

Rules are less binding, may be ignored, etc. See § 606 *ante*.

### § 639. Classification of ordinances.

Ordinances may be classified under four general heads:

First, ordinances enacted by virtue of the police power, prescribing penalties for specified commissions and omissions, which may be designated as *police ordinances*.

Second, ordinances granting franchises, special privileges, etc., which may be termed *franchise* or *contract ordinances*.

Third, ordinances providing for public work, usually called *improvement ordinances*. Of this kind, there are three general classes, namely, (1) those providing for public improvements to be paid for by special assessment or special taxation (sometimes termed), levied on property assumed to be benefited because of the improvement; (2) those directing the abatement of specified public nuisances at the expense of the property owner, either by special assessment, or destruction of the property; and (3) those ordering public work at the expense of the general municipal revenue.

Fourth, ordinances (1) of a permanent character, made for the guidance and regulation of municipal officers and business, and (2) those of a temporary nature, enacted for specific purposes, which authorize and direct particular officers to do certain things, as to purchase, sell, lease, etc., property, borrow money, make contracts, and, generally, to do anything within the range of municipal competence, where the execution of the given power is not elsewhere vested. These may be termed *administrative ordinances*.<sup>70</sup>

### § 640. Same—general and special.

As regards their operation, ordinances are spoken of as *general* and *special*. All ordinances of a general

70. Administrative requiring preservation of plans, surveys and documents appertaining to officers and to be delivered to their successors, held to relate only to pub-

lic books, etc., excluded private field notes, etc. *Leffingwell v. Miller*, 20 Colo. App. 429, 79 Pac 327.

nature having an obligatory force on the community and upon the administration of the municipal government may be denominated general. Those granting franchises and special privileges to persons or corporations, providing for public work and improvement, as establishing sewer districts, ordering the construction of sewers, streets and sidewalks, fixing the grade of streets, authorizing the city to borrow money, empowering officials to do certain things, as the leasing of property, the laying of water distribution pipes, etc., are usually special. In view of the language of certain charter provisions and the construction adopted respecting repeals, this distinction is important.<sup>71</sup>

§ 641. Same—penal and non-penal—general and special.

Relating to the time of taking effect or publication after passage, ordinances are sometimes classified as penal and non-penal, and as general and special. Thus under a charter providing that ordinances imposing penalties or forfeiture shall not take effect until ten days after their adoption, an ordinance providing for the construction of a sidewalk and authorizing a special assessment to pay for the same is not such an ordinance.<sup>72</sup> So, under a charter providing that, "no ordinance subjecting any person to fine or imprisonment shall take effect until it shall have been published for at least one week in a newspaper published in said city," an ordinance authorizing the comptroller to negotiate and dispose of city bonds need not be so published.<sup>73</sup>

71. Where a section of a general ordinance refers exclusively to one subject, such section is not for that reason a special ordinance. *Lemoine v. St. Louis*, 5 Mo. App. 583.

Under some charters, a general ordinance must be repealed by ex-

press terms. *Lemoine v. St. Louis*, 72 Mo. 404, 406.

See Ch. 21 *post*.

72. *Illinois Central R. R. Co. v. People*, 161 Ill. 244, 43 N. E. 1107. Penal. *Oak Grove v. Juneau*, 66 Wis. 534, 29 N. W. 644.

73. *Stevenson v. Bay City*, 26 Mich. 44, 49.

In one case an ordinance providing fire limits within a comparatively small portion of territory was held to be a general ordinance respecting the time of taking effect.<sup>74</sup> And in another case an ordinance imposing a license tax on vehicles was held not a local or special law as prohibited by the state constitution merely because it omits automobiles and street cars.<sup>75</sup>

"By-laws of a general or permanent nature," as used in the Iowa Code relating to publication, includes a city ordinance granting a franchise.<sup>76</sup>

Respecting the mode of procedure in passage, ordinances may be general or special. Thus it has been held that a resolution awarding a contract is not of a "general or permanent nature," within the meaning of a charter provision requiring a two-thirds vote.<sup>77</sup> But a franchise ordinance granting the right to construct and operate a street railway,<sup>78</sup> one relating to impounding animals found running at large,<sup>79</sup> or one regulating the license and sale of liquor,<sup>80</sup> is an ordinance of a general or permanent nature within the meaning of charter provisions requiring reading on three different days.

#### § 642. Ordinance may combine contractual and police regulations.

It is no objection to an ordinance that it combines contractual and police regulations. Thus an ordinance granting a railway company a right to construct a railroad upon a public landing under condition forbidding

74. *Reynolds v. Harris*, 27 Weekly Law Bul. (Ohio) 229.

As to when ordinances take effect, see § 666 *post*.

75. *Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

76. *State v. Omaha & C. B. Ry. & B. Co.*, 113 Iowa 30, 84 N. W. 983.

Ordinance providing for loan is of general nature. *National Bank*

*of Commerce v. Grenada*, 44 Fed. 262, overruling 41 Fed. 87.

77. *Cincinnati v. Bickett*, 26 Ohio St. 49.

78. *Smith v. Columbus, L. & S. Ry. Co.*, 8 Ohio N. P. Rep. 1.

79. *McGraw v. Whitson*, 69 Iowa 348.

80. *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860.



the use of the track during specified hours, combines contractual as well as police provisions, but is not void, for that reason. "In so far as the ordinance granted the right or franchise to construct and operate a railway upon the public ground, it became, when accepted, a contract; but the provision by which the use of the track was prohibited during the time was, in its nature and effect, a municipal police regulation, operating in the interest of public safety.<sup>81</sup> This police provision having been enacted pursuant to clear legislative authority, the fact that it is found in an ordinance which also contains contract provisions does not change the result or affect the essential character of the power exercised; and this police provision, being thus specially authorized and duly enacted, unquestionably has, within the corporate limits, the force of a law enacted by the legislature of the state."<sup>82</sup>

### § 643. Force and effect of ordinances.

Valid ordinances of municipal corporations are as binding on the corporators and the inhabitants of the place as the general laws of the state upon the citizens at large.<sup>83</sup> The members of the council or governing

81. *McDonald v. Toledo Consolidated R. R. Co.*, 43 U. S. App. 79, 20 C. C. A. 322, 74 Fed. 104; *Hayes v. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Joy v. St. Louis*, 138 U. S. 1, 42, 11 Sup. Ct. 243, 34 L. Ed. 843.

82. *Pittsburg, C. & St. L. Ry. Co. v. Hood*, 94 Fed. 618.

83. *Force an effect of ordinances.* Ordinance to be construed as if its terms had been incorporated in the statute.

*Arkansas.* *Southwestern Telegraph & Tel. Co. v. Myane*, 86 Ark. 548, 111 S. W. 987.

*California.* *San Luis Obispo v. Fitzgerald*, 126 Cal. 279; *Murphy v. San Luis Obispo*, 119 Cal. 624; *Johnson v. Simonton*, 43 Cal. 242.

*Connecticut.* *State v. Tyron*, 39 Conn. 183.

*Georgia.* *Bearden v. Madison*, 73 Ga. 184, 186; *Perdue v. Ellis*, 18 Ga. 586.

*Illinois.* *Chicago v. Pittsburg, etc. R. Co.*, 242 Ill. 30, 89 N. E. 648, affirming 146 Ill. App. 403, 432; *Tudor v. Chicago and South Side Rapid Transit R. Co.*, 154 Ill. 129 (locating railroad); *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep.

legislative body, duly assembled for the performance of their legitimate functions, when acting within the confines of their delegated authority, constitute "a miniature general assembly," and the law-making power of the state gives their ordinances the force of laws passed by the legislature of the state.<sup>84</sup>

The municipal ordinances and the state statutes are from a common source of authority. One class presents it in a delegated, and the other in a direct form, "but

199 (stock at large); *Wright v. Chicago, etc. R. Co.*, 7 Ill. App. 438, 446; *Lindblom v. Doherty*, 102 Ill. App. 14.

*Indiana.* *Cleveland, etc. R. Co. v. Powers*, 173 Ind. 105, 113, 88 N. E. 1073, 89 N. E. 485; *Indianapolis v. Indianapolis Gas Light Coke Co.*, 66 Ind. 396 (authorizing contract).

*Louisiana.* *State v. Nicholas*, 109 La. 84, 33 So. 92.

*Michigan.* *Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580 (regulating street railways).

*Minnesota.* *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47 (prohibiting leaving horse unhitched).

*Missouri.* *Jackson v. Grand Avenue Ry. Co.*, 118 Mo. 199, 218, 219, 24 S. W. 192; *Union Depot Ry. Co. v. S. Ry. Co.*, 105 Mo. 562, 575, 16 S. W. 920; *St. Louis v. Foster*, 52 Mo. 513.

*Nebraska.* *State v. Cosgrave*, 85 Neb. 187, 122 N. W. 885.

*New Jersey.* *Bradshaw v. Camden*, 39 N. J. L. 416, 419, per Van Syckel, J.

*New York.* *Carthage v. Frederick*, 122 N. Y. 268, 271, 19 Am. St. Rep. 490 (removal of snow and ice from sidewalk); *Griffin v.*

*Gloversville*, 73 N. Y. St. 684, 67 App. Div. 403; *Gloversville v. Howell*, 70 N. Y. 287; *Roderick v. Whitson*, 51 Hun (N. Y.) 620; *People v. Reicherter*, 112 N. Y. S. 936, 128 App. Div. 675; *People v. Gilbert*, 123 N. Y. S. 264, 68 Misc. Rep. 48.

*South Carolina.* *McCormick v. Columbia Electric Street R., etc. Co.*, 85 S. C. 455, 67 S. E. 562; *State ex rel. v. Williams*, 11 S. C. 288 (forbidding bawdy houses).

*Vermont.* *St. Johnsbury v. Thompson*, 59 Vt. 300, 305, by-laws have force of special laws of the legislature (regulating victualing shops).

84. *Taylor v. Carondelet*, 22 Mo. 105, per Scott, J.

A valid ordinance is of the same force as an act of the legislature. *Commonwealth El. Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406, affirming 116 Ill. App. 116; *Cleveland C. C. & St. L. Ry. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073; *State v. Cosgrave*, 85 Neb. 187, 122 N. W. 885; *Multon Schnaier & Co. v. Grigsby*, 117 N. Y. S. 455, 132 App. Div. 854, affirming 113 N. Y. S. 548, 61 Misc. Rep. 325.

it is the power of the state which speaks in both.”<sup>85</sup>  
 “The passage of an ordinance is, of course, a legislative act.”<sup>86</sup>

85. Per Lewis, J., in *State v. Vic. De Barr*, 58 Mo. 395, 397.

86. Per Sherwood, J., in *Moore v. Cape Girardeau*, 103 Mo. 1. c. 476, 15 S. W. 755; *St. Louis v. Mfrs. Saving Bank*, 49 Mo. 574.

**Force and effect of ordinances.**  
 “When an ordinance is passed \* \* \* it is in force by the authority of the state, and is to be interpreted and executed as if it had been passed by the general assembly.” Per Gamble, J., in *St. Louis v. Boffinger*, 19 Mo. 13, 15.

“An ordinance \* \* \* has the same force and effect of a law passed by the legislature.” *Mason v. Shawneetown*, 77 Ill. 533, 537.

Lord Abinger said: “The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large.” *Hopkins v. Swansea*, 4 M. & W. 621. After approvingly quoting the above, Sherwood, J., in *State ex rel. v. Walbridge*, 119 Mo. 1. c. 394, 24 S. W. 457, 41 Am. St. Rep. 663, adds: “It is hardly necessary to say that this is the general view,” citing 1 Dill. on Mun. Corp. (4th Ed.), § 308.

The Supreme Court of the United States announces the same rule in *New Orleans Waterworks v. New Orleans*, 164 U. S. 471, 481, 17 Sup. Ct. 161, 41 L. Ed. 518: “The authority to enact by-laws is delegated to the city

by the sovereign power and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants.”

The ordinance has precisely the same effect as a legislative act, as it “is expressly authorized by the legislature, and whether it be their act or the act of the local city legislature, makes no difference.” Per Savage, Ch. J., in *Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538, 541.

The Supreme Court of Missouri said: “A charter adopted by direct grant of the constitution itself has all the efficacy of a legislative enactment, and that if \* \* \* a power be given to a city by charter framed and enacted by the legislature itself, ordinances passed in obedience to such charters are laws of the state within the municipality, and are binding upon all persons who come within the scope of their operation, unless they conflict with, and are not in harmony with the constitution and general laws of the state.” *Grand Ave. Ry. Co. v. Citizens’ Ry. Co.*, 148 Mo. 665, 671, 50 S. W. 305.

The most recent utterance of the Supreme Court of the United States supports this view. That court holds that an ordinance is

§ 644. Do ordinances differ as to force and effect from charter or statute?

In an early Ohio case it is said that the making of ordinances and by-laws by a town corporation is not the exercise of legislative power in the sense as exercised by the legislature of the state; that the latter prescribes a rule of action which operates upon all—the willing and unwilling. “It comes from a superior, and the inferior is bound to obey it. The charter to a municipal corporation is the exercise of legislative authority. It permits the establishment of by-laws and ordinances; but these are a matter of compact and agreement among the corporators. They do not act upon others, but only upon

a law of the state which may impair the obligation of a contract within the meaning of the Federal Constitution (14th amendment), so as to give the federal courts jurisdiction to enjoin its enforcement. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77, 43 L. Ed. 341.

A resolution will have the same effect. *Iron M. R. Co v. Memphis*, 96 Fed. 113.

Contracts which are in contravention of a municipal ordinance have been held void. *Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 189; *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670.

“Within the sphere of their delegated powers municipal corporations have as absolute control as the General Assembly (of the state) would have if it never had delegated such powers and exercised them by its own laws.” *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 509, 24 Am. Rep. 756.

An ordinance does not partake of the nature of a contract between the corporation and its inhabitants, and therefore the city is not liable for its non-enforcement. *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *The Municipal Code of St. Louis* (1901, McQuillin), p. 397, § 116.

An ordinance authorizing a certain contract and prescribing its terms does not give the contract the force of law or ordinance. *State ex rel. v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

Ordinance is a “law” as used in insurance policy. *Jones v. Fireman’s Fund Ins. Co.*, 2 Daly (N. Y.) 307.

Ordinances of boards of health have the force of laws within the limits of their territorial jurisdiction. *Polinsky v. People*, 73 N. Y. 65; *People ex rel. v. Court of Special Sessions Justices*, 7 Hun. (14 Sup. Ct.) 214; *People v. Board of Health*, 33 Barb. (N. Y.) 344.

themselves, and, by mutual consent either directly or indirectly expressed, through the city or town council. These ordinances so made are not the power vested exclusively in the General Assembly."<sup>87</sup>

As affects the liability of citizens *inter sese*, it has been declared in a Missouri case that ordinances differ from charter provisions and legislative acts; that laws controlling the liability of citizens *inter sese* must emanate from the legislature, in whom alone such power is vested by the constitution; that a charter of a city, adopted by the people, is as much a law of the state as if it had been enacted by the legislature, and a provision of such charter is a valid regulation and binding upon citizens both in their relation to the city and among themselves. "The reason is that the people—the source of all power—conferred the right, by the constitution, upon the city to so legislate by its organic law, just as they granted the legislative power generally to the General Assembly, or the judicial power to the courts."<sup>88</sup>

As an exercise of a legislative power pursuant to a proper delegation of authority, an ordinance of a city stands on the same general footing as an act of the legislature.<sup>89</sup>

The difference between charter and ordinance will further appear in treating of the regulation of civil rights and liabilities.<sup>90</sup>

87. Markle v. Akron, 14 Ohio 586, 590. Examine Bell v. Quinn, 2 Sandf. (N. Y.) 146, 151.

88. The action was for alleged negligence, charging violation of an ordinance regulating the careful movement of street cars and designed to protect the public. Sanders v. Southern Electric Ry. Co., 147 Mo. 411, 427, 48 S. W. 855.

89. Pittsburg C. & St. L. R. Co.

v. Hartford City, 170 Ind. 674, 85 N. E. 362; 82 N. E. 787, 20 L. R. A. (N. S.) 461.

90. Ch. 16 *post*. Baker v. Portland, 58 Me. 199, 10 Am. Law Reg. (N. S.) 559, note by Judge Redfield; Johnson v. Simonton, 43 Cal. 242.

Charter may create civil liability. Rockford v. Hilderbrand, 61 Ill. 155.

### § 645. Requisites of a valid ordinance stated.

The general requisites of a valid municipal ordinance, one legally binding upon all whom it is designed to operate, may be thus briefly summarized:

1. It must be promulgated by a public, or municipal corporation, duly created and legally existing.

2. It must emanate by virtue of power inherent in the corporation, or power either expressly or impliedly delegated to it by the state.

3. It must relate to a subject within the scope of the corporation.

4. It must be in harmony with the Constitution of the United States and the state, the laws of the United States and the state, the municipal charter and general principles of the common law in force in the state.<sup>91</sup>

5. Unless it originates by virtue of express delegated power by the state, it must be reasonable in its terms.

6. It must be adopted by the authorized tribunal, legally convened.

7. It must be in form as provided.

8. It must be precise, definite and certain in expression.

9. It must be passed in the manner prescribed.

10. It must be enacted in good faith, in the public interest alone, and designed to enable the corporation to perform its true functions as a local governmental organ.<sup>92</sup>

91. *Glendinning v. Denver* (Colo., 1911), 114 Pac. 652, citing *McQuillin*, Mun. Ord., § 14.

92. "A good by-law should be (a) clearly and definitely expressed, (b) positive, general and equal in its operation as a law, and (c) reasonable in its terms. It must be (d) within the express or necessarily implied powers of the corporation, (e) consistent with, not repugnant to, the gen-

eral law of the land, and (f) made *bona fide* in the interests of the corporation, not to serve those of some other person or body of persons." *Biggar*, Mun. Manual of Canada, p. 327; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; *Zanone v. Mound City*, 103 Ill. 552, 556; *Chicago v. Rumpff*, 45 Ill. 90, 97; *Tugman v. Chicago*, 78 Ill. 405.

§ 646. Ordinances must conform to charter.

The charter of the city is the organic law of the corporation,<sup>93</sup> and it bears the same general relation to the ordinances of the city that the constitution of the state bears to the state statutes.<sup>94</sup> The proposition is self-evident, therefore, that an ordinance can no more change

**Requisites of a valid by-law in the English law.**

(1). A by-law must not be *ultra vires*. Thomas v. Sutters, 1 Ch. 10, 63 J. P. 724, 69 L. J. Ch. 27, 81 L. T. 469, 48 W. R. 133, 16 L. T. R. 7; Rex v. Wood, 5 El. & Bl. 49; Waite v. Garston Local Board, L. R., 3 Q. B. 5, 32 J. P. 228, 37 L. J. M. C. 19, 17 L. T. 201, 16 W. R. 78; Rudland v. Sunderland Corporation, 49 J. P. 359, 52 L. T. 617, 33 W. R. 164; Wood v. Venton, 54 J. P. 662; Byrne v. Brown, 57 J. P. 741.

(2). A by-law must be certain in its terms and positive, i. e., it must contain a definite and imperative prohibition or command, and "adequate information as to the duties of those who are to obey," per Mathew, J., in Kruse v. Johnson, 2 Q. B. 91, 62 J. P. 469, 67 L. J. Q. B. 782, 78 L. T. 647, 46 W. R. 630, 14 T. L. R. 416; Foster v. Moore, 4 L. R. Ir. 670; Nash v. Finlay, 66 J. P. 183, 85 L. T. 682; Blackpool Local Board v. Bennett, 4 H. & N. 127.

(3). A by-law must not be repugnant to the general law, "for all by-laws which are contrary to the laws or statutes of the realm are void and of no effect." 5 Coke Rep. 63a; Edmonds v. Wattermen, 1 Jur. (N. S.) 727; Rex v. Sadler, 3 El. & Bl. 80; Gentel

v. Rapps, 1 K. B. 160, 66 J. P. 117, 71 L. J. K. B. 105, 85 L. T. 683, 50 W. R. 216, 18 T. L. R. 72; Batchelor v. Sturley, 69 J. P. 398, 93 L. T. 539; Strickland v. Hayes, 1 Q. B. 290, 60 J. P. 164, 65 L. J. M. C. 55, 74 L. T. 137, 44 W. R. 398, 12 T. L. R. 199; Rex v. Richards, 61 J. P. 40; Bentham v. Hoyle, 3 Q. B. D. 293, 47 L. J. M. C. 51, 37 L. T. 753, 26 W. R. 314.

(4). A by-law must be general and not particular in its application. Kruse v. Johnson, *supra*.

(5). A by-law must be reasonable. Coke, 4 Rep. 126, 127; Slatery v. Naylor, 13 App. Cas. 446, 57 L. J. C. P. 73, 59 L. T. 41, 36 W. R. 897; Kruse v. Johnson, *supra*.

93. East Tennessee University v. Knoxville, 6 Baxt. (Tenn.) 166, 170; Asphalt & Granitoid Const. Co. v. Hauessler, 201 Mo. 400, 100 S. W. 14; Kansas City v. Marsh Oil Co., 140 Mo. 458, 471, 41 S. W. 943; St. Louis v. Dorr, 145 Mo. 466, 478, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; St. Louis v. Foster, 52 Mo. 513; People ex rel. v. Mount, 186 Ill. 560, 58 N. E. 360; Williams v. Davidson, 43 Tex. 1, 35; Gabel v. Houston, 29 Tex. 335, 343; Cooley's Const. Lim. (6th Ed.), 227.

94. Quinette v. St. Louis, 76 Mo. 402.

See § 320 *et seq. ante*.

or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.<sup>95</sup> Thus charter power to remove an "officer at pleasure" cannot be limited by ordinance to removal "for cause."<sup>96</sup> So charter power of the council to appoint and remove certain officers cannot be transferred by ordinance to the mayor and council.<sup>97</sup> So where like charter power is vested in the mayor and council, an ordinance cannot confer such power in the council alone.<sup>98</sup> So an ordinance which abridges the term fixed

95. A city ordinance which does not comply with the charter is as invalid as a statute which does not conform to the requirement of a state constitution. *People ex rel. v. Mount*, 186 Ill. 560, 568, 58 N. E. 360.

"Corporations cannot make by-laws contrary to their constitution. If they do so they act without authority." Per Yates, J., in *Rex v. Spencer*, 3 Burr. 1839.

*California*. *Placerville v. Wilcox*, 35 Cal. 21.

*Georgia*. *Haywood v. Savannah*, 12 Ga. 404, 409.

*Maine*. *Andrews v. Insurance Co.*, 37 Me. 256.

*Michigan*. *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578.

*Minnesota*. *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89.

*Missouri*. *Peters v. St. Louis*, 226 Mo. 62, 125 S. W. 1134; *Cape Girardeau v. Fougau*, 30 Mo. App. 551; *Hisey v. Charleston*, 62 Mo. App. 381; *Kemp v. Monett*, 95 Mo. App. 452, 69 S. W. 31.

*New Jersey*. *Landis v. Vineland*, 54 N. J. L. 75, 23 Atl. 357.

*New York*. *People v. Gilbert*, 123 N. Y. S. 264, 68 Misc. Rep. 48.

*Tennessee*. *State v. Nashville*, 83 Tenn. 697, 54 Am. Rep. 427.

*Texas*. *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Gabel v. Houston*, 29 Tex. 335, 343.

*United States*. *Thompson v. Carroll*, 22 How. (U. S.) 422, 16 L. Ed. 387; *Thompson v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453.

96. An ordinance providing that the appointment of a city officer shall continue until removed "for cause" is of no effect, where the city charter (St. Joseph) authorizes the appointment by the council during "its pleasure." *State ex rel. v. Johnson*, 123 Mo. 43, 50, 27 S. W. 399.

To same effect, *Horan v. Lane*, 53 N. J. L. 275, 21 Atl. 302; *Uffert v. Vogt*, 65 N. J. L. 377, 621, 48 Atl. 574, 47 Atl. 225. See *State v. Draper*, 50 Mo. 353.

97. *State (Volk) v. Newark*, 47 N. J. L. 117.

98. *Com. v. Crogan*, 155 Pa. St. 448, 26 Atl. 697.



by charter,<sup>99</sup> or which confers greater powers on an officer, e. g., the mayor, than those given by charter or legislative act,<sup>1</sup> will be held void in accordance with the principle stated. Some charters confer upon the officer or head of a department full authority to select all of his subordinates, deputies, clerks and employees, and where such charter power exists the officer cannot be deprived of this power of selection on the part of the legislative body.<sup>2</sup> The rule is that the power of appointment conferred by charter or statute cannot be taken away by ordinance.<sup>3</sup> Power to pass ordinances is not only limited by the express terms of the charter, but they must not conflict in any degree with its object or the purposes for which the local corporation is organized.<sup>4</sup>

§ 647. Ordinance must conform to the statutes and general laws of the state.

Ordinances must not be inconsistent with the statutes or general laws of the state, for if they are they will be

99. Vason v. Augusta, 38 Ga. 542; Stadler v. Detroit, 13 Mich. 346; East St. Louis v. Kase, 9 Ill. App. 409; Jacksonville v. Allen, 25 Ill. App. 354.

1. Union Depot Railway Co. v. Smith, 16 Colo. 361, 27 Pac. 329.

2. The Municipal Code of St. Louis (1901, McQuillin), p. 385, § 89.

3. Horan v. Lane, 53 N. J. L. 275, 21 Atl. 302.

4. Taylor v. Griswold, 14 N. J. L. (2 Green), 222; Mt. Pleasant v. Breeze, 11 Iowa 399.

Ordinances regulating compensation and fee of city attorney. Boucher v. Moberly, 74 Mo. 113; Lonergan v. Louisiana, 83 Mo.

App. 101; Kemp v. Monett, 95 Mo. App. 452, 69 S. W. 31.

An ordinance passed without authority is void. Goar v. Rosenberg, 53 Tex. Civ. App. 218, 115 S. W. 653.

That an ordinance prior to a later statute designated the judicial officer of a town as the "police judge," when by the statute then in force he was styled "recorder" is an immaterial variance; the charter controls and the change of the style of the office did not affect the jurisdiction of the officer.

Nor is it material that the *de facto* police judge called himself "special police judge." Brookfield v. Tooev, 141 Mo. 619, 43 S. W. 337.

null and void, unless they emanate by virtue of express grant of the state.<sup>5</sup>

The circumstances under which the ordinance may supersede general laws of the state upon the same subject are discussed elsewhere.<sup>6</sup>

The adjudications afford many illustrations of this doctrine. Thus an ordinance imposing upon a municipal officer the duties which are required by statute to be performed by a state officer is unauthorized and void.<sup>7</sup> So where the mayor is empowered by statute "in his discretion \* \* \* to impose a fine not exceeding twenty dollars" for a particular offense, an ordinance prescribing a fine of not less than three dollars nor more than twenty dollars for the same offense, was held void,

5. *Waller v. Osban*, Fla. (1910), 52 So. 970; *State v. Winterrowd*, Ind. (1910), 91 N. E. 956, 92 N. E. 650; *People v. Gilbert*, 123 N. Y. S. 264, 68 Misc. Rep. 48.

Ordinances must be consistent with the general laws. "All by-laws must ever be subject to the general law of the realm and subordinate to it." *Norris v. Staps*, Hob. 210.

By-laws or ordinances which infringe the common or statute law of the state, or particular statutes relating to the corporation (provided these particular statutes do not impair the obligation of the charter) are void. *Haywood v. Savannah*, 12 Ga. 404, 409.

Ordinances which conflict with the constitution or statutes of the state or charter of the local corporation are void. *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *Thompson v. Carroll*, 22 How. (U. S.) 422, 16 L. Ed. 387.

Where a state law prohibits an act, a city ordinance previously in force cannot be invoked to permit the same act. *Mahew v. Eugene* (Oregon), 104 Pac. 727.

A constitutional provision requiring uniformity in the operation of all laws does not apply to municipal ordinances. *Ex parte Zhizhuzza*, 147 Cal. 328, 81 Pac. 955; *Ex parte Gughmini*, 147 Cal. XVI, 81 Pac. 958.

"The rule that a city ordinance in conflict with a state law upon the same subject is void can have no logical application, unless the state law with which the particular ordinance conflicts is intended to apply and is, in fact, applicable and operative in the city in which such ordinance has been enacted." *Robinson v. Galveston*, 51 Tex. Civ. App. 292, 111 S. W. 1076, 1079.

6. Chapter 21, amendment and repeal of ordinances. Chapter 24, municipal control of offenses against the state.

7. *State (Reed) v. Camden*, 50 N. J. L. 87, 11 Atl. 137.

as limiting the discretion of the mayor conferred by state statute.<sup>8</sup> The rule of law seems to be firmly established that, without express grant on the part of the state, that which is allowed by the general laws of the state cannot be prohibited by ordinance.<sup>9</sup> Thus where the sale of intoxicating liquor or pool selling is licensed by state statute, an ordinance forbidding such sales altogether within the corporate limits is void.<sup>10</sup> So without express legislative grant, an ordinance cannot authorize what the statutes forbid.<sup>11</sup>

8. *Landis v. Vineland*, 54 N. J. L. 75, 23 Atl. 357.

Ordinance prescribing greater penalty than state law is void. *Schroder v. Charleston*, 3 Brev. (S. C.) 533.

The penalties must be the same (by constitution). *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948.

But see chapter 17, Penalties.

9. *Collins v. Hatch*, 18 Ohio 523, 51 Am. Dec. 465.

10. Ordinances must harmonize with the state law—illustrations. Sale of liquor. *Robinson v. Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; *State v. Brittain*, 89 N. C. 574; *State v. Langston*, 88 N. C. 692.

Pool selling. *Ex parte Ogden* (Tex. Cr. App., 1902), 66 S. W. 1100.

Ordinances relating to animals running at large cannot conflict with state stray laws. *Marietta v. Fearing*, 4 Ohio 427, 431.

Such laws supersede municipal charters granted after their passage. *Dodge v. Gridley*, 10 Ohio 173, per Lane, C. J.

11. *In re Ridenbaugh*, 5 Idaho 371, 49 Pac. 12.

*Gambling. State v. Caldwell*, 3 La. Ann. 435.

Selling hay without inspection. *New York v. Nichols*, 4 Hill (N. Y.) 209.

Selling liquor on Sunday. *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425.

When ordinance and state statute need not correspond. Regulation of bay windows. *Commonwealth v. Goodnow*, 117 Mass. 114. Selling liquor on Sunday. *McPherson v. Chebanse*, 114 Ill. 46, 28 N. E. 454.

Salary or fees of city officer fixed by state law cannot be changed by ordinance. *Behan v. New Orleans*, 34 La. Ann. 128; *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433; *Loneragan v. Louisiana*, 83 Mo. App. 101.

City authorities cannot change salaries of state officer, without express power. *Jarvis v. New York*, 49 How. Pr. (N. Y.) 354; *Landon v. New York*, 39 N. Y. Super. Ct. 467.

An ordinance required policemen to shoot unmuzzled dogs found in any public highway within the corporate limits. Held, the ordinance cannot be pleaded as an excuse for discharging a

The numerous cases in the notes will show the circumstances under which ordinances have been held void because inconsistent with the laws of the state.<sup>12</sup>

firearm in a public street in violation of a state statute. *Lynn v. State*, 33 Tex. Cr. Rep. 153, 25 S. W. 779.

The fact that the state grants hucksters' licenses will not render void an ordinance prohibiting hawking in the city. *Dutton v. Knoxville*, 121 Tenn. 25, 113 S. W. 381.

Where a state law exempts from municipal taxation any traveling salesman taking orders for the delivery of goods where no delivery is made at the time, an ordinance imposing a specific tax on transient dealers of certain articles is invalid. *Hofmayer v. Blakely*, 116 Ga. 777, 43 S. E. 69.

An ordinance is not void merely because it is not as broad as the statute on the same subject. *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 148, 112 S. W. 525.

12. Ordinances must not be inconsistent with the state laws.

*Alabama.* Ex parte Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130 (quarantine regulations); *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441.

*Arkansas.* *Morrilton v. Comes*, 75 Ark. 458, 87 S. W. 1024; *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214 (carrying concealed weapons); *Siloam Springs v. Thomson*, 41 Ark. 456, 461 (liquor selling); *State v. Lindsay*, 34 Ark.

372 (licensing gambling); *Vance v. Little Rock*, 30 Ark. 435 (taxation).

*California.* Carpet beating machine. Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93.

Selling lottery tickets. Ex parte Solomon, 91 Cal. 440, 27 Pac. 757.

Visiting house of ill fame. In re Ah You, 88 Cal. 99, 25 Pac. 974, 22 Am. St. Rep. 280.

Opium smoking, etc. In re Sic, 73 Cal. 142, 148, 14 Pac. 405.

*Connecticut.* *State v. Smith*, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301 (licensing); *State v. Welsh*, 36 Conn. 215 (liquor selling); *South Port v. Ogden*, 23 Conn. 128 (taking oysters); *State v. Wordin*, 56 Conn. 216 (report by physicians).

*Florida.* *State v. Dillon*, 42 Fla. 95, 28 So. 781.

*Georgia.* *Rothschild v. Darien*, 69 Ga. 503; *Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *State v. Georgia Med. Soc.*, 38 Ga. 608; *Adams v. Albany*, 29 Ga. 56; *Livingston v. Albany*, 41 Ga. 22.

*Illinois.* *Petersburg v. Metzker*, 21 Ill. 205 (fine); *Duggan v. Peoria, D. & E. Ry. Co.*, 42 Ill. App. 536 (regulating railways).

*Iowa.* *Burlington v. Kellar*, 18 Iowa 59, 65.

*Kansas.* *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473 (license on lawyers).

Ordinances to be valid must observe the requirements of the state statute on the same subject.

§ 648. Same—exception.

By virtue of special power conferred by the state the municipal corporation may enact ordinances contrary to the general state policy, as expressed in general statutes. It is no ground of objection to the validity of prohibitory ordinances, or ordinances regulating the vending of liquor, bawdy houses, and local police matters generally which are peculiarly municipal offenses, that the general laws of the state do not extend the power of pro-

*State v. Young*, 17 Kan. 414, distinguishing *Emporia v. Volmer*, 12 Kan. 622; *Saline v. Seitz*, 16 Kan. 143; *Alexander v. O'Donnell*, 12 Kan. 608; *State ex rel. v. Topeka*, 36 Kan. 76, 12 Pac. 310.

*Kentucky.* *March v. Commonwealth*, 12 B. Mon. (Ky.) 25; *Simrall v. Covington*, 90 Ky. 444, 29 Am. St. Rep. 398.

*Louisiana.* *New Orleans v. Philippi*, 9 La. Ann. 44; *State v. Burns*, 45 La. Ann. 34, 11 So. 878.

*Massachusetts.* *Com. v. Selen*, 128 Mass. 308.

If ordinance is broader than statute it is void. *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464 (fire protection); *Commonwealth v. Roy*, 140 Mass. 432, 4 N. E. 814 (fast riding).

*Minnesota.* *State v. St. Paul*, 32 Minn. 329, 20 N. W. 243 (sales of vegetables); *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89 (sale of meat); *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (licensing butchers, etc.).

*Missouri.* *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 148, 112 S. W. 525; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 525; *Kemp v. Monett*,

95 Mo. App. 452, 69 S. W. 31; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663 (removal of officers); *Rugles v. Collier*, 43 Mo. 353, 363; *Kansas City v. Hallett*, 59 Mo. App. 160; *St. Joseph v. Vesper*, 59 Mo. App. 459; *In re Dunn*, 9 Mo. App. 255; *Carr v. St. Louis*, 9 Mo. 191; *St. Louis v. Cafferata*, 24 Mo. 94; *Paris v. Graham*, 33 Mo. 94; *St. Louis v. Heitzeberg, P. & P. Co.*, 141 Mo. 375, 42 S. W. 954, 64 Am. St. Rep. 516, 39 L. R. A. 551 (smoke ordinance); *Weber v. Johnson*, 37 Mo. App. 601; *Baldwin v. Green*, 10 Mo. 410.

*Nebraska.* *State v. Hardy*, 7 Neb. 377 (liquor selling).

*New Hampshire.* *State v. Noyes*, 30 N. H. 279.

*New Jersey.* *White v. Bayonne*, 49 N. J. L. 311, 8 Atl. 295; *Lozier v. Newark*, 48 N. J. L. 452, 2 Atl. 815; *Outwater v. Borough of Carlstadt*, 66 N. J. L. 510, 49 Atl. 533; *State (Volk) v. Newark*, 47 N. J. L. 117; *Breninger v. Belvidere*, 44 N. J. L. 350; *State (Bowyer) v. Camden*, 50 N. J. L. 87, 11 Atl. 137; *State v. Jersey City*, 29 N. J. L. 170.

*New York.* *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425; *Cowen v.*

hibition or regulation to all municipal corporations and parts of the state. "Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns, which the more sparsely settled portions of the country find unnecessary. And it is for legislative discretion to determine, within the limitations of the constitution, to what extent city or town councils shall be invested with the power of local legislation." <sup>13</sup>

West Troy, 43 Barb. (N. Y.) 48;  
New York v. Nichols, 4 Hill (N. Y.) 209.

*North Carolina.* State v. Austin, 114 N. C. 855, 19 S. E. 919, 41 Am. St. Rep. 817 (forbidding minors in saloons); Weith v. Wilmington, 68 N. C. 24; State v. McCoy, 116 N. C. 1059, 21 S. E. 690 (gambling, when covered by statute, cannot be regulated by ordinance).

*Ohio.* Mays v. Cincinnati, 1 Ohio St. 268 (hucksters); Markle v. Akron, 14 Ohio 586 (sale of liquor); Cincinnati v. Gwynne, 10 Ohio 192 (collection of special tax by action of debt).

*Pennsylvania.* Livingston v. Wolf, 136 Pa. St. 519, 20 Atl. 551, 20 Am. St. Rep. 936 (use of sidewalk, bay windows, etc.).

*Rhode Island.* State v. Pollard, 6 R. I. 290 (disorderly conduct).

*South Carolina.* State v. Charleston, 12 Rich. Law (S. C.) 480 (establishing a court for trial of free persons of color, valid).

*Tennessee.* Katzenberger v. Lawo, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. Rep. 681, 13 L. R. A. 135; State ex rel. v. Nashville, 15 Lea (83 Tenn.) 697; Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205.

*Texas.* Bohmy v. State, 21 Tex. Crim. App. 597, 2 S. W. 886; Flood v. State, 19 Tex. Crim. App. 584; Angerhoffer v. State, 15 Tex. Crim. App. 613; Ex parte Garza, 28 Tex. Crim. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

*Wisconsin.* State v. Fisher, 33 Wis. 154 (liquor selling).

13. Burckholter v. McConnellsville, 20 Ohio St. 308, 315, per Scott, C. J.

"The modes of procedure customary and suitable in the rural districts, to prevent and punish offenses against person and property, are utterly inadequate to the purpose where men are aggregated in the dense masses of the cities. Hence the necessity and sanction for an efficient organization of police. \* \* These laws, though peculiar to the municipality which enacts and enforces them, and though different from the general laws of the state applicable to all the people of the state, have never, for such reasons, been supposed to be invalid. They have not been deemed obnoxious to the objection of being partial laws, or not laws of the land." *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382, 388, 389.

The circumstances under which ordinances supersede or repeal general state statutes are treated elsewhere.<sup>14</sup>

**§ 649. Ordinances must harmonize with the public policy and common law of state.**

A municipal corporation cannot, without special authority, prohibit what the policy of a general statute of the state permits.<sup>15</sup> Thus under a general grant of power, a municipal corporation cannot adopt ordinances "which infringe the spirit, or are repugnant to the policy, of the state as declared in its legislation."<sup>16</sup>

The rule has often been declared that ordinances must be in harmony with the principles of the common law in force in the state.<sup>17</sup> This principle is copiously illustrated in cases relating to nuisances. The rule is uniformly adhered to that a municipal corporation cannot arbitrarily declare that to be a nuisance, without proof, which is not so in fact, or recognized as such by the general principles of the common law, or by state statute.<sup>18</sup>

14. See Chapters 21 and 24 *post*.

15. *Canton v. Nist*, 9 Ohio St. 439.

An ordinance is void if it is against the policy of the general statute of the state, as one relating to the sale of liquor. *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

16. *Durango v. Reinsberg*, 16 Colo. 327; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. 230, 34 Pac. 902; *Waller v. Osban*, Fla. (1910), 52 So. 970; *Marietta v. Fearing*, 4 Ohio 427; *Collins v. Hatch*, 18 Ohio 523.

*Contra*, *Roberts v. Ogle*, 30 Ill. 459.

17. *Simrall v. Covington*, 90 Ky. 444, 14 S. W. 369, 29 Am. St. 398; *Barling v. West*, 29 Wis. 307, 315, 9 Am. Rep. 576; *Mt. Pleasant v. Breeze*, 11 Iowa 399; *Taylor v. Griswold*, 14 N. J. L. (2 Green) 222.

18. See chapter 25, ordinances relating to police powers. Ch. 24, Municipal control of offenses against state.

Ordinances in derogation of the common law must be strictly construed. They cannot be enlarged by implication. *Holton v. Titcomb*, 102 Me. 272, 10 L. R. A. (N. S.) 580, 66 Atl. 733.

### §650. Ordinances must be enacted in good faith.

The declaration is often encountered, especially in the earlier cases, that the ordinance must be passed in good faith. The establishment of this fact, of course, is difficult, and sometimes impossible. In many instances, the requirement that ordinances should be made *bona fide* is synonymous, or used interchangeably, with the declaration that the ordinance should be enacted in the interest of the corporation and public, as distinguished from private interests.<sup>19</sup> Thus in the exercise of the police power, "the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."<sup>20</sup> So in the legitimate exercise of the power to remove dead animals the corporation will not be permitted to confer such right arbitrarily upon one firm or individual to the exclusion of all others by preventing competition, imperatively required by the charter, and thereby create a monopoly to the detriment of the inhabitants.<sup>21</sup> So under charter power to limit the number of inns or houses of entertainment, and, with assent of the electors, to prohibit the sale of spirituous liquors, a by-law limiting the number of licenses to one in a township ten miles square and containing 6,000 inhabitants (besides those of a large village situated within the township) was set aside as unreasonable. "It was not a *bona fide* exercise of the discretion of limiting the number of licensed taverns. \* \* \* It was in reality a prohibitory measure \* \* \* and was intended to give the go-by to a legislative enact-

19. Good faith in enacting ordinance. "By-laws, even though reasonably within the powers of the corporation, and not at variance with the general law of the land, may be set aside if it be shown that in passing them the

council have not exercised *bona fide* the powers conferred upon them by the legislature." Biggar, *Mun. Manual of Canada*, p. 332.

20. *Austin v. Murray*, 16 Pick. (Mass.) 121, 126, per Wilde, J.

21. See Ch. 18 and 19 *post*.



ment which gave the inhabitants of the township a direct voice upon the question of prohibition.”<sup>23</sup>

In regulating, by ordinance, the price of commodities, as, for example, gas, the price must be fixed at a reasonable rate; but if it is fraudulently placed at a rate which would inevitably entail loss on the part of the company required to furnish it, the ordinance will be held not to have been passed in good faith.<sup>24</sup>

As a violation of the rule of good faith, a by-law for the division of territory into electoral districts, passed to favor the majority of the members of the council to the prejudice of the minority, and to thus control the election, was set aside as unjust, partial and oppressive.<sup>25</sup>

In a Canadian case power was conferred to enact by-laws “for regulating or prohibiting the passage of traction engines, threshing machines or other heavy vehicles over highways or bridges upon highways,” etc. A by-law providing that no traction engine, steam engine, threshing machine or water tank should pass or be transported over any of the highways of the municipality, “except at the sole risk of the owner of such engines,” etc., was set aside as not being a *bona fide* exercise of the power conferred, because it neither regulated nor prohibited the passage of the engines, etc., but was merely an attempt to escape the liability to keep highways in repair as required by law and the consequences of neglecting to do so. The court said: “It does seem that the by-law is rather a refusal by the municipality to exercise the power conferred by the act, than a *bona fide* exercise of it.”<sup>26</sup>

23. Per Robinson, C. J., In re Barclay and Township of Darlington, 12 Up. Can. Q. B. 86, followed In re Greystock and Township of Otonabee, 12 Up. Can. Q. B. 458.

To same effect, Re Brodie and Town of Bowmanville, 38 Up. Can. Q. B. 580.

24. State v. Cincinnati Gas Co., 18 Ohio St. 262.

25. Mongenais v. Corporation of Rigand, Quebec Rep., 11 Sup. Ct., Canada, 348.

To same effect, Kirkham v. Russell, 76 Va. 956, 961.

26. McMillan v. Portage La Prairie, 11 Manitoba Rep. 216, 219.

As the corporation is not designed to promote private interests, ordinances favorable alone to corporations and individuals or classes of individuals, in contravention of the public rights, are unwarranted. Likewise ordinances passed in bad faith and intended to discriminate unreasonably against certain persons or classes, as negroes,<sup>27</sup> Chinese laundrymen,<sup>28</sup> etc., will be condemned by the courts.<sup>29</sup>

The question as to how far the motives of the members of a municipal body will be inquired into by the court is discussed elsewhere.<sup>30</sup>

### § 651. Ordinances must be definite and certain.

Every ordinance must be clear, precise, definite and certain in its terms. If the ordinance is so vague that its precise meaning cannot be ascertained it will be declared void.<sup>31</sup> An ordinance providing that no occupant of land abutting on a private way shall suffer any filth to remain on that part of the way adjoining his land is not open to objection of indefiniteness because it does not fix a time beyond which it shall not be allowed to remain.<sup>32</sup> So an

27. Ch. 19 *post*.

28. Ch. 18 *post*.

29. As to ordinance fixing municipal charge for use of streets by poles, etc., of telegraph company, see dissenting opinion of Mr. Justice Brown in *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 105, 13 Sup. Ct. 485, 37 L. Ed. 380. Chapters 18 and 19, *post*.

30. §§ 703, 704 *post*.

31. *State v. Cedaraski*, 80 Conn. 489, 69 Atl. 19; *Chicago, I. & L. Ry. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631, citing *McQuillin*, *Mun. Ord.* § 20.

Ordinance must be definite and certain. 'It has been well said that a by-law ought to be expressed in such manner as that its meaning may be unambiguous,

and in such language as may be readily understood by those upon whom it is to operate.' Per Woodhull, J., in *McConvill v. Jersey City*, 39 N. J. L. 38, 42, citing *Grant on Corp.*, 86.

As to certainty of penalty, see ch. 17, Penalties of municipal ordinances, *post*.

32. In order to vary or alter the common law, a by-law ought to be reasonably clear, definite and free from ambiguity in its language. *Jack v. Ontario, S. & H. R. W. Co.*, 14 Up. Can. Rep. 328; *Crome v. Steeper*, 46 Up. Can. Rep. 87.

This applies especially to those which create a new office. *Foster v. Moore*, 4 Law Rep. (Ir.), Crown Cases reserved, 670.

ordinance directed against the game of "policy" is not void for uncertainty because it does not set out the particular facts which constitute the game.<sup>33</sup> So an ordinance declaring it an offense to "conduct a house of ill-fame in an indecent manner" was sustained as sufficient, without specification of the various acts of indecency.<sup>34</sup>

An ordinance will not be held void for indefiniteness because of difficulty in applying or construing its provisions. Thus an ordinance passed by virtue of express legislative grant, and following the words of the statute, forbidding the sale of intoxicating liquors in the "residence portion," and permitting such sales in the "business portion" of the city, was held sufficiently definite without defining the boundaries of either district.<sup>35</sup> So the words "small ware," as used in the statute conferring the power, may be employed in the ordinance, without definition or further description.<sup>36</sup> So an ordinance pro-

33. *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146.

The court will take notice of the fact that the term "policy playing" was in current use when the ordinance was passed. *State v. Carpenter*, 60 Conn. 97, 102.

Keeping place for playing policy. *State v. Flint*, 63 Conn. 248.

34. "It could scarcely be expected that an ordinance affecting houses of this kind should specify the particular acts of indecency which will render its inmates obnoxious to the law's denunciation. These acts may be so various in kind and so different in degree, and withal so numerous, as to defy specification. The experience of the city fathers in that domain is doubtless so limited that in drafting an ordinance which should comprehend all the indecent convolutions of lascivious cyprians they would be

forced to put fancy on the wing, and imagine postures they never beheld. This would be dangerous occupation. \* \* \* This ordinance, prohibiting a bawdy house being kept in an indecent manner, clothes the magistrate necessarily with discretion to determine whether the particular acts proved are indecent." *Shreveport v. Roos*, 35 La. Ann. 1010.

35. *Shea v. Muncie*, 148 Ind. 14, 20, 46 N. E. 138.

The maxim "*falsa demonstratio non nocet*," applied and false part of description rejected in *Poland v. Connolly*, 16 Ohio St. 64.

As to description of boundaries, etc., in improvement ordinances, see chapter on public improvements *post*.

36. *Harris v. Hamilton*, 44 Up. Can. Q. B., 641.

hibiting driving or riding an animal on the street "faster than an ordinary trot," was held not too vague or uncertain.<sup>37</sup> But an ordinance prohibiting riding or driving a horse on the street "at an immoderate gait so as to endanger or expose to injury any person" was held bad, as not indicating what was meant by the use of the term "immoderate gait."<sup>38</sup> For the same reason an ordinance simply forbidding the driving of any "drove or droves" of horned cattle through the streets, etc., was pronounced void for vagueness.<sup>39</sup>

Further illustrations appear in the note.<sup>40</sup>

37. The court said that "an ordinary trot is easily shown by proof, and is well understood by any man who has seen horses exercise or trot." *Nealis v. Hayward*, 48 Ind. 19, 21.

38. *Commonwealth v. Roy*, 140 Mass. 432, 4 N. E. 814.

39. *McConvill v. Jersey City*, 39 N. J. L. 38.

40. *Regulating markets*. *First Municipality v. Cutting*, 4 La. Ann. 335. *In re Nightingale*, 11 Pick. (Mass.) 168.

*Signs*. *State v. Higgs*, 126 N. C. 1014.

*Bay windows*. *Commonwealth v. Goodnow*, 117 Mass. 114; *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. Rep. 936.

*Burning lime*. *State v. Mott*, 61 Md. 297.

*The speed of trains*. *Chicago & E. I. R. R. Co. v. Beaver*, 96 Ill. App. 558.

*Location of livery stables*. *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. 230, 34 Pac. 902.

*Fixing water rates*. *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116; *San Francisco Pioneer Wool-*

*en Factory v. Brickwedel*, 60 Cal. 166.

*Establishing boundaries*. *Williams v. Willard*, 23 Vt. 369.

*Exceptions in ordinance does not render its operation unreasonable*. *Emporia v. Shaw*, 6 Kan. App. 808.

*Buildings of combustible material*. An ordinance forbidding the erection within certain limits of buildings constructed of combustible material or any material not fire proof, held not unreasonable or obscure because of failure to define combustible and fire proof. *Chimine v. Baker*, Tex. Civ. App. (1903), 8 Tex. Ct. Rep. 10, 75 S. W. 330.

*Removal of snow and ice*. A by-law provided that whenever a sidewalk fronting or adjoining any lot shall be wholly or partially covered with snow or ice it shall be the duty of the owner, occupant or the person having charge thereof to cause said sidewalk to be made safe and convenient by removing said snow within six hours after the accumulation of same, or in case of ice, by covering the same with sand

The rules respecting the certainty of improvement ordinances are considered elsewhere.<sup>41</sup>

§ 652. Ordinances of cities of same class may vary.

Cities, although of the same class and organized under the same general laws, need not adopt uniform ordinances. The ordinances may be as variant as the varying municipal necessities, conveniences and sense of public policy in those who exercise the legislative authority may require.<sup>42</sup> The same rule applies to ordinances of cities adopting their own charters under constitutional provisions, and to cities under special legislative charters.

§ 653. Notice to be taken of ordinances.

Notice of the existence of ordinances is required to be taken by all upon whom they have a binding effect,<sup>43</sup> as the inhabitants of the municipal corporation which enacted them.<sup>44</sup> So railroad companies and their employes, using railways within the city, must take notice of all valid ordinances relating to the operation of the road and the cars thereon.<sup>45</sup> So strangers coming within the corporate limits, upon whom ordinances are binding, are chargeable with notice thereof.<sup>46</sup>

within same time and prescribing a fine for failure to comply therewith is not void as vague and indefinite. *State v. McMahon*, 76 Conn. 97, 55 Atl. 591.

41. Chapter on public improvements, *post*.

42. *Covington v. East St. Louis*, 78 Ill. 548.

43. *Alabama. North Birmingham Street R. R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. 105.

*Massachusetts. Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670.

*Missouri. Palmyra v. Morton*, 25 Mo. 593.

*New York. Buffalo v. Webster*, 10 Wend. (N. Y.) 99.

*Washington. Burmeister v. Howard*, 1 Wash. 207.

*England. Glover, Mun. Corps.*, 290.

44. *Mather v. Ottawa*, 114 Ill. 659, 663; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 218, 219, 24 S. W. 192; *London v. Venacie*, 12 Mod. 269.

45. *Central R. & B. Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 13 S. E. 520.

46. *Pierce v. Bartrum*, Cowp. 269; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Queen v. Osler*, 32 Up. Can. Q. B. 324, 333.

As all persons upon whom they are binding are charged with constructive notice of valid ordinances, no one when prosecuted for violation of an ordinance will be permitted to show that he did not know of its existence.<sup>47</sup>

### § 654. Who are bound by ordinances?

A by-law of a public or municipal corporation is not an agreement but a law, binding on all persons to whom it applies, whether they agree to be bound by it or not.<sup>48</sup> Therefore the law seems to be well settled in this country and in England that, in the absence of special charter or legislative restraint, local by-laws and ordinances of a general nature are binding upon all persons within the corporate limits, whether residents or not.<sup>49</sup>

47. *Central Georgia Ry. Co. v. Bond*, 111 Ga. 13, 36 S. E. 299.

48. *Per Lindley, L. J., in London Association, etc., v. London India D. J. Co.*, 3 Ch. (1892), p. 252.

**Who bound by ordinances.** An ordinance is not retrospective, of course. *Willow Springs v. Withaupt*, 61 Mo. App. 275.

As to binding effect on street railroad not in existence when ordinance enacted, see *Thompson v. Citizens' Street R. Co.*, 152 Ind. 461, 53 N. E. 462.

When railroad accepts an ordinance it is thereby bound by its provisions. *Chicago, etc. R. Co. v. People*, 79 Ill. App. 529.

By-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons. *State v. Overton*, 24 N. J. L. 435, 440.

49. *Glover, Mun. Corp.*, 289, 290; *Willcock, Mun. Corp.*, 105, 107; *Butchers Co. v. Morey*, 1 Bla. 370.

An ordinance purporting to affect persons beyond the corporate limits is not therefore void as to persons within the limits. *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 99 Am. St. Rep. 918.

The people having the power of local government, their by-laws therefore bind strangers coming within the limits. *Cuddock v. Eastwick*, 1 Salk. 192.

*Alabama.* *N. B. St. R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. 105.

*Indiana.* *Horney v. Sloan, Smith (Ind.)* 136.

*Missouri.* *Knox City v. Whitaker*, 87 Mo. App. 468.

*Massachusetts.* *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670.

*Minnesota.* *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237.

*New York.* *Jones v. Fireman's Ins. Co.*, 2 Daly (N. Y.) 307; *Buf-*

The principle is that whoever comes to reside in any place for however short a duration of time, is an inhabitant *pro hac vice*, and consequently bound by the same regulations as the other members of the corporation.<sup>50</sup> "The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written."<sup>51</sup> As stated by the Supreme Court of Ohio, in an early case, "these principles prevail in all well-organized governments, and the experience of ages has proved their practical utility."<sup>52</sup> Many expressions of like import are found in judicial decisions.<sup>53</sup>

falo v. Webster, 10 Wend. (N. Y.) 99.

*Pennsylvania.* Gibson v. Corapolis, 22 Pitts. L. J. N. S. (Pa.) 64.

*South Carolina.* Kennedy v. Sowden, 1 McMillan (S. C.) 323; Charleston v. King, 4 McCord, L. (S. C.) 487.

**By-laws of private corporations.** "Those dealing with the corporation through its officers are bound to take the same notice of its by-laws and ordinances that a citizen of the state is with reference to legislative enactments. These ordinances are not such by-laws as apply to private corporations, where none are interested except the individual members, and the rules and regulations by which they are governed are kept subject alone to their own custody and within their own knowledge." Murphy v. Louisville, 9 Bush (Ky.) 189, 196.

50. Pierce v. Bartrum, Cowp. 269; Plymouth v. Pettijohn, 4 Dev.

Law (15 N. C.) 591, per Ruffin, C. J.

51. Per Putnam, J., In re Vandine, 6 Pick. (23 Mass.) 187, 190, 17 Am. Dec. 351.

52. Marietta v. Fearing, 4 Ohio 427, 431.

53. **Ordinances are binding on strangers.** "A non-corporator and non-resident is liable for a breach of the city ordinance, and may be sued and convicted thereof, in the city court." Charleston v. Pepper, 1 Rich. Law (S. C.) 364, 366.

"All who bring themselves within the limits of the corporation are, while there, citizens so as to be governed by its laws." Whitefield v. Longest, 6 Ired. (N. C.) 268, per Nash, J.

In the absence of special grant, "the powers and jurisdiction of the local corporation are confined to its own limits and its own internal concerns;" therefore, "its by-laws and ordinances are binding upon none but its own mem-

### § 655. Ordinances are operative upon property within the corporate limits.

Ordinances are not only binding on persons, but upon property conveyed or coming within the corporate limits.<sup>54</sup> Thus an ordinance forbidding animals, as hogs, from running at large, operates as well on non-residents who suffer their hogs to run at large within the prohibited limits, as upon those who are actually residents.<sup>55</sup> But where the state law forbids, such ordinances cannot

bers and those properly within its jurisdiction." *Gass v. Greenville*, 4 Sneed (Tenn.) 62.

*Contra.* A town cannot impose a penalty by ordinance on a stranger for cutting grass on the "salt meadows" or "common lands" of the town, but must resort to the common law remedy, to recover damages for the alleged trespass. Here it was merely held that a penalty could not be imposed by the town on any person as a trespasser; that the powers given to the town "extend only to regulations for the enjoyment of their common lands, as between those who have a right to enjoy them as commons. \* \* \* The legislature never intended to delegate to any person or body corporate the power of imposing penalties for injuries to their own lands by trespassers." *Foster, Supervisor of Jamaica v. Rhoads*, 19 Johns. (N. Y.) 191, 193.

54. *Gossellink v. Campbell*, 4 Iowa 296; *McKee v. McKee*, 8 B. Mon. (Ky.) 433.

55. *Cartersville v. Lanham*, 67 Ga. 753; *Whitfield v. Longest*, 6 Ired. (N. C.) 268; *Friday v. Floyd*, 63 Ill. 50; *Crosby v. Warren*, 1 Rich. Law (S. C.) 385; *Folmar v.*

*Curtis*, 86 Ala. 354; 5 So. 678; *Horney v. Sloan, Smith* (Ind.) 136.

Ordinances are binding on animals of non-residents. "It is the hog that is not permitted to run at large, and whether it be the property of a resident or non-resident, the mischief is the same and there can be no difference." *Rose v. Hardie*, 98 N. C. 44, 47, 4 S. E. 41, approving *Whitfield v. Longest*, 6 Ired. (N. C.) 268.

*Spittler v. Young*, 63 Mo. 42, holding that the ordinance did not apply to a case where the escape of the hogs was unavoidable—as a result of a flood—where it appears that the owner used due diligence in attempting to recover them.

Vote of a town to restrain cattle from going at large, applies to those of a non-resident. *Gilmore v. Holt*, 4 Pick. (Mass.) 258, 264.

Particular ordinance requiring cattle to be penned at night to keep them off the street, held not to apply to cattle of a non-resident, not kept in the city. Per *Ruffin, C. J.*, in *Plymouth v. Pet-tijohn*, 4 Dev. Law (N. C.) 591.



be made to apply to the stock of non-residents running within the city.<sup>56</sup> Notwithstanding a railroad company does not formally submit itself to the police regulations and ordinances of a city upon entering it, under the principle stated, such company is subject to such regulations nevertheless.<sup>57</sup>

**§ 656. Same—rule as applied to licenses.**

A license tax imposed on all persons who packed and shipped fish, etc., from the local corporation was held, in a North Carolina case, binding on residents and non-residents alike.<sup>58</sup> So it has been held that a tax on all traders applies to non-residents.<sup>59</sup> So a by-law prohibiting any person not duly licensed therefor from removing house dirt and offal from the city was held to apply to a non-resident.<sup>60</sup> So ordinances imposing fines for failure to take out licenses by non-residents who employ wagons for hire within the city have been sustained.<sup>61</sup> But such

56. *Marietta v. Fearing*, 4 Ohio 427, 431.

Held to apply to municipal charters granted after the passage of the Estray Act. *Dodge v. Gridley*, 10 Ohio 173.

Where the charter expressly provided that ordinances shall not be obligatory on persons or property of non-residents of the corporation, who are citizens of the state, "unless in case of intentional violation," the stock of a non-resident may be forfeited under an ordinance when it appears that he has knowledge of such ordinance, and knew or had reason to believe that his animals when let loose would go into the city. *Knoxville v. King*, 7 Lea (75 Tenn.) 441.

57. *City & Suburban Ry. Co. v.*

*Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106.

See *Chicago, etc. R. R. Co. v. People*, 79 Ill. App. 529.

58. *Edenton v. Capeheart*, 71 N. C. 156.

59. "It is settled that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation." *Wilmington v. Roby*, 8 Ired. (N. C.) 250.

License, held to apply to non-resident butchers doing business in the city. *State ex rel. Wilkinson v. Charleston*, 2 Speers (S. C.) 623.

60. *In re Vandine*, 6 Pick. (Mass.) 187.

61. *Charleston v. Pepper*, 1 Rich. Law (S. C.) 364, 367; *Pittsburg v. Craft*, 1 Pitts. (Pa.) 77.

ordinances, to be valid, must not discriminate against non-residents.<sup>62</sup>

In Missouri an ordinance exacting a license tax for wagons used for pay was held not applicable to wagons of outside residents engaged in hauling in and out of the city. Here it was said that the authority to enact such ordinance cannot be conferred, since the tax being upon outside residents and for the benefit of those living in the city would be, in effect, taking property for private use; that is, for the use of a particular community of which the outside citizen forms no part.<sup>63</sup>

Power to enact such ordinances must exist. Thus where the charter power is restricted to imposing licenses upon attorneys who *reside* within the city, the ordinance cannot be made applicable to a non-resident attorney who maintains an office and does business within the city.<sup>64</sup> Likewise, where the charter power to tax is limited to taxable property within the city of non-residents, an ordinance imposing a license tax on carriages used by non-residents going to and from their places of business in the city is unauthorized. But where a slave was expressly placed under the police regulations of the corporation, under such power, he became taxable property within the city.<sup>65</sup>

### § 657. Territorial operation of ordinances.

Municipal ordinances are necessarily local in their application. Usually they operate only in the territory of the municipality by which they are enacted and can have

62. *Bennett v. Birmingham*, 31 Pa. St. 15.

63. *St. Charles v. Nolle*, 51 Mo. 122.

The legislature cannot authorize a municipal corporation to tax, for its own local purposes lands lying beyond the corporate limits. *Wells v. Weston*, 22 Mo. 384.

Compare *Langhorne v. Robinson*, 20 Gratt. (Va.) 661.

64. *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

65. *Charleston v. State ex rel. Adger*, 2 Speers (S. C.) 719.

See ch. on license tax and ordinances relating thereto, *post*.

no force beyond it.<sup>66</sup> Of course, it is entirely competent for the legislature to confer power to pass ordinances which will operate beyond the corporate boundaries. This may be done for the purpose of suppressing or preventing nuisances, which affect the inhabitants of the corporation.<sup>67</sup> Sometimes the power is conferred to regulate, prohibit and license the sale of intoxicating liquor for a specified distance beyond the municipal boundaries.<sup>68</sup>

A municipal ordinance designed for the city at large operates throughout its boundaries, whatever their change.<sup>69</sup> Thus a by-law forbidding the keeping of a

66. *Taylor v. Americus*, 39 Ga. 59; *Strauss v. Pontiac*, 40 Ill. 301; *Robb v. Indianapolis*, 38 Ind. 49; *Horney v. Sloan*, 1 Ind. 266; *Gosselink v. Campbell*, 4 Iowa 296; *Hoggatt v. Bigley*, 6 Humph. (Tenn.) 236; *Town of Barton v. Hamilton*, 18 Ontario Rep. 199, 202; *In re Boylan and City of Toronto*, 15 Ontario Rep. 13; *Gettysburg v. Ziegler*, 2 Pa. Co. Ct. Rep. 326.

Ordinance cannot regulate fares of a street car company to be charged beyond the city limits. *South Pasadena v. Los Angeles*, etc. R. Co., 109 Cal. 315, 41 Pac. 1093.

Cannot tax land beyond limits for municipal purposes. *Wells v. Weston*, 22 Mo. 384. Compare *Langhorne v. Robinson*, 20 Gratt. (Va.) 661.

67. *Chicago, etc. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; 1 Starr & Curtis Ill. Stat., p. 685, § 45; *Jarvis v. Pinckney*, 3 Hill (S. C.) 123; *Biggar Mun. Manual of Canada*, p. 327.

See ch. 25 *post*.

68. *Toledo v. Edens*, 59 Iowa 352, 13 N. W. 313.

2 McQ.—34

*Regulation of hucksters one mile beyond*. *Snell v. Belleville*, 30 Up. Can. Q. B. 81.

Penalty on hack owners residing beyond corporate limits void. *Lenox v. Georgetown*, 1 Cranch C. C. 608 Fed. Cas. 8245.

69. *Illinois*. *People ex rel. v. Chicago Tel. Co.*, 220 Ill. 238, 249, 77 N. E. 245.

*Indiana*. *Indiana Ry. Co. v. Hoeffman*, 161 Ind. 593, 69 N. E. 399.

*Iowa*. *Toledo v. Edens*, 59 Ia. 352.

*Michigan*. *Deneen v. Houghton*, etc. Ry. Co., 150 Mich. 235, 113 N. W. 1126, 14 Det. Leg. N. 670.

*Missouri*. *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121, 133.

*United States*. *Central R. Co. v. Chicago*, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622.

Special provisions as to force of ordinance where two cities consolidate. *Camp v. Minneapolis*, 33 Minn. 461, 23 N. W. 845.

Prior ordinances remain in force, when. *People v. Harrison*, 191 Ill. 257, 61 N. E. 99, affirming 92 Ill. App. 643

slaughter house within the limits of a town will apply to a subsequent addition to the town.<sup>70</sup> So a penal ordinance relating to the sale of liquor, which, in terms, applies to "any territory over which the town may have jurisdiction for that purpose," operates in territory over which the town is given jurisdiction by subsequent legislative act.<sup>71</sup>

### § 658. Places within municipal jurisdiction.

Speaking generally, the police jurisdiction of the municipality extends to every part of its territory, and, as a rule, a violation of a valid ordinance at any place within such territory constitutes an offense against its authority. Thus a camp-meeting conducted within the limits of the local corporation, although authorized by state laws, is subject to its ordinances. This rule was applied to one duly licensed by the municipal authorities to sell food and drink within the corporate limits, and it was held that such person was thereby authorized to sell such articles at the camp-meeting.<sup>72</sup> So where a town is duly

70. *Virginia v. Smith*, 1 Cranch C. C. 47, Fed. Cas. 16,967.

Application of ordinances to annexed territory. *Swift v. Klein*, 163 Ill. 269, 45 N. E. 219; *Covington v. East St. Louis*, 178 Ill. 548.

Denied. *New Orleans v. Anderson*, 9 La. Ann. 323.

71. **Ordinance operates on territory annexed.** "If an ordinance be enacted and afterwards the city limits be extended by adding adjacent territory no one would contend that a new ordinance must be passed in order to be operative in the newly acquired territory. We can see no difference between that case and this. By this law (legislative act) the extension of the power and jurisdiction is absolute. It does not

depend on any act or ordinance of the city specially adopting or invoking the power. If the ordinance had been passed after the law went into force it would not have been necessary that it should specify that its operation extended two miles beyond the city limits. It so extended by the express provision of the law." *Toledo v. Edens*, 59 Iowa 352, 353, 13 N. W. 313.

72. "And we think a turnpike road passing through a town is as much a highway, for the purposes of the act, as a road laid out by authority of the Court of Sessions or of the town. The mischief is the same." *Gilmore v. Holt*, 4 Pick. (Mass.) 258, 264.

authorized to prohibit animals from running at large within its limits the force of its ordinances for this purpose is co-extensive with the territorial limits of the town, and includes a turnpike road passing through it. And for police purposes a turnpike road within the corporate limits, although the fee of the soil thereof is in the turnpike company, is subject to such reasonable regulations as may be deemed expedient.<sup>73</sup>

In an early New York case it was held that a legislative act extending the bounds of the town over the adjacent navigable waters did not thereby grant the land covered by the waters to the town; but the authority was merely for the purposes of civil and criminal jurisdiction. Hence an ordinance prohibiting the raking of clams within the boundary lines of the town, under penalty, was declared void as applied to such navigable waters. In the opinion of the court, the town "must show a *right of property to the lands* \* \* \* in the bay \* \* \* in order to entitle them to make rules to regulate the use of those lands."<sup>74</sup>

### § 659. Same—wharves.

Certain police ordinances must be limited in their operation to public places, or to such places over which the municipal corporation has control. Thus an ordinance imposing penalties in respect of the using or obstructing the *public* wharves, docks, piers and slips was held not to apply to wharves, etc., of private citi-

Question related to paving and grading turnpike road, and assessing abutters for expense thereof. Held, the fact the city has no charter right to compel the company to grade or pave its road, did not invalidate the

assessment therefor. State (Parker) v. Brunswick, 30 N. J. L. 395.

73. Ex parte McNair, 13 Neb. 195, 197, 13 N. W. 172.

74. Palmer v. Hicks, 6 Johns. (N. Y.) 132.

zens.<sup>75</sup> The basis upon which wharfage and levee charges are authorized to be made is that, by the expenditure on the part of the municipal corporation of money and labor, works are constructed and maintained which facilitate discharging and receiving the cargoes and afford to vessels the means of mooring and remaining in security. Hence, ordinances imposing such charge at a point where the city had constructed no works and expended no money are uniformly held to be beyond the power of the local corporation.<sup>76</sup>

75. It appears that in state and municipal legislation a distinction was made between public and private wharves, etc. *Vandewater v. New York*, 2 Sandf. Sup. Ct. (N. Y.) 258.

Power to regulate sale of wood restricted to public landings. *Southwark v. Neil*, 3 Yeates (Pa.) 54.

76. *New Orleans v. Wilmot*, 31 La. Ann. 65; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Illinois, etc. Co. v. St. Louis*, 2 Dill. C. C. 70; *Waddingham v. St. Louis*, 14 Mo. 190.

**Right to collect wharfage.** Ordinarily, improvements of some kind are necessary to authorize collection of wharfage. *Dubuque v. Stout*, 32 Iowa 47, 80, 7 Am. Rep. 171; *Keokuk v. Keokuk N. L. Packet Co.*, 45 Iowa 196; *Muscatine v. Hershey*, 18 Iowa 39.

**Right to collect sustained in absence of expenditures for improvements.** *Sacramento v. Steamer New World*, 4 Cal. 41.

The right to charge and collect wharfage is said to be a right of property and not a right of sovereignty. *St. Louis v. Schulenburg*

& *B. Lumber Co.*, 13 Mo. App. 56.

But the power to erect wharves, landings, etc., on navigable waters and charge toll for the use thereof is a franchise which can only come from the state. The act incorporating the town does not alone confer such right. *St. Martinsville v. Steamer "Mary Lewis"*, 32 La. Ann. 1293.

"Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by the state, a municipal corporation, or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not at its election, and thus may incur a liability for wharfage or not, at the choice of the master or owner." Per Mr. Justice Strong in *Packet Co. v. Keokuk*, 95 U. S. 80, 85, 24 L. Ed. 377.

"The sums paid by the plaintiff in error were exacted and paid as compensation for the use of the

## § 660. Same—private property.

Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid although the property of such places is not that of the city, or, strictly speaking, public property of any kind. "The fact that it is commonly used by hackmen in their business for the purposes mentioned in the ordinance is sufficient." 77

It cannot be questioned that the city has power to pro-

improved wharf, and not for the mere privilege of entering and stopping at the port of Saint Louis, or for landing at the shore in its natural condition where there were no conveniences which could be called a wharf." Per Mr. Justice Harlan in *Packet Co. v. St. Louis*, 100 U. S. 423, 429, 25 L. Ed. 688.

The following decisions of the United States Supreme Court support this view: *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *Steamship Co. v. Port Wardens*, 6 Wall. 31; *Coolley v. Port Wardens*, 12 How. 299, 13 L. Ed. 996.

City cannot impose a duty or tonnage tax on vessels landing on the natural bank of a river. *Cape Girardeau v. Campbell*, 26 Mo. App. 12, although such landing be made within the wharf limits established by ordinance. *Ib.* The landing place becomes a wharf when it is improved—designating it as such by ordinance is insufficient. *Ib.*; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Tobin v. Vicksburg*, 100 U. S. 430, 25 L. Ed. 690

A license fee is a tax within the meaning of § 3, art. X, of the

Constitution of Missouri, and must be uniform on the same class of subjects within the territorial limits of the authority levying it. *St. Louis v. Consolidated Coal Co.*, 113 Mo. 83, 20 S. W. 699; *St. Louis v. Spiegel*, 90 Mo. 587, 2 S. W. 839; *St. Louis v. Bowler*, 94 Mo. 630, 7 S. W. 434.

The city may make a classification of boats for wharfage tax; therefore it may make a higher rate for all not returned and assessed for taxation during a designated year. *St. Louis v. St. Louis & N. O. Trans. Co.*, 84 Mo. 156, 12 Mo. App. 570; *St. Louis v. Consolidated Coal Co.*, 113 Mo. 83, 20 S. W. 699.

The city cannot collect wharfage for goods landed beyond its wharf in times of high water. *St. Louis v. Schulenburg & Boeckler Lumber Co.*, 13 Mo. App. 56.

City cannot make wharfage charges for the use of private wharves. *Dugan v. Baltimore*, 5 Gill. & J. (Md.) 357.

See § 402 *et seq. ante*.

77. *St. Paul v. Smith*, 27 Minn. 364, 366, 7 N. W. 734; *Emerson v. McNeil*, 84 Ark. 552, 554, 106 S. W. 479, 480, citing *McQuillin, Mun. Ord.*, § 28.

vide reasonable regulations respecting the use of private property in order to prevent such property, or the use thereof, from being annoying or detrimental to the life or limb or health of any who may be in the city. Its jurisdiction in this respect may be extended to any place within its limits. Hence, an ordinance forbidding the throwing from the second or upper floors of any building, etc., or from lowering out of such place, cotton in bales, goods or any other article, "without a good and sufficient tackle and rope," is a proper police regulation, and such ordinance operates in all parts of the city, and its violation may occur on private property.<sup>78</sup>

The territorial police jurisdiction is well illustrated in an early New York case. The ordinance provided that "all hogs shall be kept up." It was held to have no application to an action of trespass, supported by proof that the hogs went into complainant's cornfield through a partition fence which divided his farm from the farm of the owner of the hogs. Manifestly, the ordinance was intended to forbid hogs from going at large, which, in the language of the court, "means that they shall not be free commoners upon the highways. It was not intended by this by-law to interfere with the interior economy or management of every man's farm. It could not reasonably have been intended to compel every farmer to keep his swine in a close pen. The power of the town for such interior regulation may well be doubted." Therefore, as the hogs did not enter through the *outer fence* adjoining a highway or common, but through an *inner* or partition fence between two neighbors, the ordinance could not be applied to such case.<sup>79</sup>

#### § 661. Same—regulating speed of trains.

Municipal territorial jurisdiction is further illustrated in cases arising under ordinances regulating the speed

78. The point was made, which was denied by the court, that the *locus in quo* being a close was not within the penalty of the

ordinance. *Charleston v. Elford*, 1 McMullan (S. C.) 234.

79. *Sheppard v. Hees*, 12 Johns (N. Y.) 423.



of street cars and railroad trains within the corporate limits. The general rule is that such ordinances apply equally to all territory within the corporate limits over which the road runs, including that not laid off into lots, streets or alleys or occupied with buildings, as well as land and property owned by the railroad company,<sup>80</sup> as switchyards.<sup>81</sup>

In one case such ordinance was held not to apply to engines used in moving cars and making up trains at places within the yards of the company and in and about their own stations, which were not within the limits of any public street or thoroughfare. But the ordinance involved, in terms, limited its application to engines and cars "while passing through the city." The opinion concedes power in the city to regulate the speed at all places within its limits, even in places outside of the limits of public streets.<sup>82</sup>

Where a railroad passes through a populous city, crossing its streets at various points, the exercise of the police power would be of little service to the public, if it could be only at the street crossings. "It may be said that the public has no right to inhibit the speed of trains within the company's own domain, provided the company checks up and crosses the street at the legal rate of speed. But in the exercise of police power such as this, the actual state of affairs must be taken into account; thus not only the difficulty, perhaps impossibility,

80. *Whitson v. Franklin*, 34 Ind. 392; *Merz v. Mo. Pac. R. R. Co.*, 88 Mo. 672, 14 Mo. App. 459.

81. *Crowley v. B., C. R. & N. Ry. Co.*, 65 Iowa 658, 663, 20 N. W. 467, 22 N. W. 918.

The ordinance of St. Louis requiring the bell to be rung and a man to be on the foremost car while a train is backing, applies to the moving of cars in private grounds of the railroad company.

*Kelley v. Union Ry. and Transit Co.*, 18 Mo. App. 151, 160.

82. *Green v. D. H. Canal Co.*, 38 Hun (N. Y.) 51; *Cincinnati N. O. & T. P. R. Co. v. Commonwealth*, 31 Ky. L. Rep. 1113, 104 S. W. 771.

Regulating speed of trains confined to streets, squares and public grounds under particular charter power. *State (N. J. R. & T. Co.) v. Jersey City*, 29 N. J. L. 170.

of reducing a speed at the rate of twenty-five miles per hour to four or five miles an hour in the short space of three or four hundred feet, but also the fact that (though without right) many persons are found walking upon the tracks of the railroads at all hours. Now as a matter of police regulation it will not do to answer: let the people, who go where they have no right, take care of themselves. The police power is enacted not only for those who exercise a proper degree of reflection, but for those who may not. Life is too sacred to place its security on a basis so uncertain. \* \* \* The safety of a dense population is to be guarded by the police power in a great city, even though in doing this the power may be called into exercise within the dwellings, the lots and private ways of citizens. We see not that the railroad company has greater rights within the city than others.”<sup>83</sup>

Sometimes it appears reasonable to the courts to limit the operation of such ordinances and thus deny their application to certain parts of the road, although within the corporate limits. Thus an ordinance, limiting the speed of railway trains to four miles an hour where the road passed through agricultural lands, fenced on both sides for three miles, after entering the limits of the city and before reaching the inhabited portion thereof, was held to operate as a restraint upon commerce, and, therefore, as to such portion of the road, unreasonable and inoperative.<sup>84</sup>

83. *Pennsylvania Co. v. James*, 81 Pa. St. (32 P. F. Smith) 194, 202, 203.

84. Limiting operation of ordinances. “The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole traveling public.” *Meyers v. C., R. I. & P. Co.*, 57 Iowa 555, 42 Am. Rep. 50.

Ordinance may be held unreasonable as applied to one or two

streets, but valid as a whole. *State (Pennsylvania R. R.) v. Jersey City*, 47 N. J. L. 286; *Burg v. Chicago, etc. R. R.*, 90 Iowa 106, 57 N. W. 680; *Nicoulin v. Lowery*, 49 N. J. L. 391, 8 Atl. 513; *Rahway Gaslight Co. v. Rahway*, 58 N. J. L. 510, 34 Atl. 3.

*Contra*. *Wygant v. McLauchlan*, 39 Oregon 429, 87 Am. St. Rep. 673, 64 Pac. 867; *Mason City v. Barngrover*, 26 Ill. App. 296.

Where an ordinance limits the speed of trains until gates and signals are erected and operated, it ceases to be in force when such appliances are put in operation, and is not revived by the subsequent failure of the companies to operate them.<sup>84a</sup>

### § 662. Judicial limitation of operation of ordinances.

Courts sometimes also limit the operation of other classes of ordinances. Thus the general power conferred by charter "to license, regulate and restrain" the sale of liquor, within the city, was held not to authorize a license tax from one engaged in selling liquor at a place two or three miles remote from the settled portion of the city. Here it was said that, to authorize such tax "the benefits to the parties must be reciprocal." It was also held that the city by reason of its general police powers had no right to exact such tax where it appeared that no police supervision was ever taken over such place other than to demand and collect such license fee. The court remarked: "A municipal government is one investing the people of a place with the local government thereof. The 'local government' cannot be said to include that which is not local, nor in any way concerns the 'local' affairs."<sup>85</sup>

The whole subject is fully treated in the chapter on police regulations, ch. 24 *post*.

In the absence of limitation to that effect in the ordinance, an ordinance forbidding the running of railroad trains within the municipal limits at a greater than a specified rate of speed will not be construed as applying merely to streets and crossings. *Blue-dorn v. Mo. Pac. Ry. Co.*, 108 Mo. 439, 445, 18 S. W. 1103, 32 Am. St. Rep. 615.

Speed of trains, unreasonable as to part. *Plattsburg v. Hagen-*

*bush*, 98 Mo. App. 669, 673, 73 S. W. 725.

84a. *Hecker v. Illinois Cent. R. Co.*, 231 Ill. 574, 83 N. E. 456.

85. *Salt Lake City v. Wagner*, 2 Utah 400, 403, distinguishing *Falmouth v. Watson*, 5 Bush. (Ky.) 660, which was put upon the ground that "the vending of ardent spirits was in such proximity to the town as to render its exercise liable to affect the good order or peace of the local community."

See ch. 18 *post*.

### § 663. Ordinances operating in public or particular places only.

Certain police regulations are confined to public or particular places, as streets, alleys, etc., or to acts committed in view of the public, or to specified localities. Thus ordinances relating to drunkenness, for instance, usually restrict such offense to the streets or sidewalks or other public places. Such regulations merely seek to prohibit *public* drunkenness.<sup>86</sup>

In Missouri, an ordinance was sustained which forbade drunkenness "upon any street or sidewalk or in any business house within the corporate limits."<sup>87</sup> So an ordinance prescribing a fine against any one who should be "found intoxicated on the streets" of the village was sustained.<sup>88</sup>

The following common instances may be mentioned where ordinances are intended to have merely a limited and local application: Regulations respecting the sale of refreshments in markets; forbidding the sale of farm products, meat, fish, vegetables, etc., on particular streets or at places other than markets or other designated places;<sup>89</sup> lounging about markets and other public places; intoxication at market places; disallowing dogs or un-

86. Drunkenness or intoxication, in itself, in a public place, is held to be an offense.

*Iowa.* Bloomfield v. Trimble, 54 Iowa 399, 6 N. W. 586; Nevada v. Hutchins, 59 Iowa 506, 13 N. W. 634; State v. Garrett, 80 Iowa 589, 46 N. W. 748; State v. Pierce, 65 Iowa 85, 21 N. W. 195.

*Massachusetts.* Commonwealth v. Morrissey, 157 Mass. 471, 32 N. E. 664.

*Indiana.* State v. Sevier, 117 Ind. 338, 20 N. E. 245.

*New York.* People v. French, 102 N. Y. 583; Hill v. People, 20 N. Y. 363.

*Tennessee.* State v. Smith, 3 Heisk. (Tenn.) 465.

1 Cooley's Blackstone (3d Ed.), Book 1, p. 123; 2 Cooley's Blackstone (3d Ed.), Book 4, p. 63; Tiedeman's Lim. Police Power 302; 1 Bishop's Crim. Law (7th Ed.), § 403.

87. Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. 750.

88. Green City v. Holsinger, 76 Mo. App. 567.

89. Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; People v. Keir, 78 Mich. 98, 43 N. W. 1039.

ruly animals in market places during market hours; forbidding the delivering of addresses, discourses, etc., in public parks and on commons without permission;<sup>90</sup> the riding or driving of any animal upon a sidewalk;<sup>91</sup> the throwing or placing upon any sidewalk or crosswalk fruit or vegetable or other substance which, when stepped upon by any person, is liable to cause him or her to slip or fall; the throwing or casting upon the street or sidewalk articles which will obstruct it, as wires, ashes or animal, vegetable or any substance whatever; distributing advertising matter so as to litter the public streets, etc.; noise on streets or sidewalks, as beating a tambourine;<sup>92</sup> restricting the establishment of cemeteries and burial places; confining dairies and cow stables, slaughter-houses, soap factories, brick kilns, quarries, the storing of gunpowder and other explosives to particular localities; compelling railroad companies to station switchmen at certain public crossings.

**§ 664. Ordinances applying to a part of the city only are valid.**

Where ordinances are designed to apply only to certain districts or designated parts of the territorial limits of the authority enacting them, to be valid, it must appear that such districts are so situated as to require peculiar and exceptional provisions. The following ordinances of this character have been sustained as reasonable: Forbidding propelling cars by use of steam or locomotive power on certain streets;<sup>93</sup> limiting bookmaking and poolselling to certain localities;<sup>94</sup> the keeping of swine

90. *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577.  
91. *Commonwealth v. Forrest*, 170 Pa. St. 40, 32 Atl. 652, reversing 3 Pa. Dist. Rep. 797, where it was held that a bicycle was an "animal" within the meaning of the law.

92. *Vance v. Hadfield*, 22 N. Y. St. 858.

93. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734.

94. *Chicago v. Brownell*, 146 Ill. 64, 34 N. E. 595, reversing 41 Ill. App. 70.

within particular districts;<sup>95</sup> forbidding animals from running at large within designated limits;<sup>96</sup> washing and ironing in public laundries and wash houses in certain sections;<sup>97</sup> livery stables in residence districts;<sup>98</sup> requiring the removal of snow and ice by owners or occupants of houses bordering upon specified streets;<sup>99</sup> designating limits in which prostitutes shall dwell;<sup>1</sup> exempting from the operation of an ordinance directed against the emission of dense smoke, resident districts;<sup>2</sup> forbidding saloons;<sup>3</sup> killing of animals;<sup>4</sup> wooden buildings in designated districts,<sup>5</sup> and forbidding the erection of any stationary or swinging sign or any stationary awning shed, across the whole or any part of the sidewalk, which is limited in its operation to a portion of the city only.<sup>5a</sup>

So ordinances (provided the corporation possesses the necessary grant of power) may prohibit heavy hauling on certain streets which may be established as boulevards, and forbid the use of wagons, drays or trucks carrying coal, lumber, hay, iron, machinery, ice, merchandise, farmers' produce, stone, brick, sand, dirt or earth, building material, etc., or forbid driving cattle, horses, mules, hogs, sheep, etc., on such boulevards, or

95. *Commonwealth v. Patch*, 97 Mass. 221.

96. *Chattanooga v. Norman*, 92 Tenn. 73, 20 S. W. 417.

97. Per Mr. Justice Field in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. Ed. 923, approved in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. Ed. 1145.

98. *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84, affirming 58 Ill. App. 539.

99. *In re Goddard*, 16 Pick. (Mass.) 504, per Shaw, C. J.

In Canada the council may pass by-laws as to the removal of snow and ice and define certain areas or streets within the municipal-

ity, within or upon which the by-law shall be operative. *Biggar*, *Munic. Manual*, p. 663; *Stinson v. Browning*, L. R., 1 C. P. 321.

1. *L'Hote v. New Orleans*, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899.

2. *People v. Lewis*, 86 Mich. 273, 49 N. W. 140, 37 Am. & Eng. Corp. Cas. 481.

3. *People ex rel. v. Cregier*, 138 Ill. 401, 28 N. E. 812.

4. *Brooklyn v. Cleves, Hill & Denio*, Supp. (N. Y.) 231.

5. *Knoxville v. Bird*, 12 Lea (Tenn.) 121, 47 Am. Rep. 326.

5a. *Ivins v. Trenton*, 68 N. J. L. 501, 53 Atl. 202, affirmed 69 N. J. L. 451, 55 Atl. 1132.

prohibit the establishment of business houses bordering thereon.

So, under proper grant of power, ordinances may establish on certain streets, building lines and provide that a certain class or character of buildings shall be erected in such district, and may forbid flats, apartment houses, etc. All these and like regulations are general in the larger and more important cities of the country. Like restrictions may be made respecting awnings, signs, billboards, etc.

Further illustrations of ordinances of this nature appear in the chapters on the reasonableness of ordinances and police regulations.<sup>6</sup>

#### § 665. Same—improvement ordinance.

In the exercise of the power to open, construct and otherwise improve highways, streets, alleys, etc., the ordinance providing therefor must necessarily apply to districts or parts of the city. Such ordinances will not be declared void for this reason. What districts are to be embraced and what parts of streets, etc., improved, whether the entire length of the street, or one block or part of a block, depend upon the desirability or necessity of the improvement and the local laws controlling such matters. Partial improvements and improvement by sections are often permitted. Under some charters improvement or benefit districts are established for the construction of streets, sewers, etc. In an early Tennessee case it was held that the ordinance could not select individuals by name and compel improvements and omit others in the same district, without reason therefor.<sup>7</sup>

6. Chs. 18 and 24 *post*.

Ordinance dividing municipal limits into railroad districts and limiting the rate of speed of trains in one only, held void. *Lake View*

*v. Tate*, 130 Ill. 247, 22 N. E. 791, affirming 33 Ill. App. 78.

7. *White v. Mayor, etc.*, 2 Swan. (Tenn.) 364.

The subject of improvement ordinances is fully treated in a subsequent chapter.<sup>8</sup>

### § 666. When do ordinances take effect.

Many charters prescribe that no ordinance except the general appropriation ordinance shall take effect or go in force until a certain time (usually ten days) after its approval, unless otherwise provided in the ordinance, or in case of an emergency, etc., the body enacting it, by designated vote, ordinarily two-thirds, otherwise directs; and frequently such vote is required to be taken by yeas and nays and entered upon the record.<sup>9</sup> The provision is in the nature of a limitation upon the legislative and ministerial power. It is intended to enable the public to acquire knowledge of the ordinance before it shall become operative for any purpose.<sup>10</sup> Where persons are made liable to penal consequences it is a hardship if they are not seasonably informed. The attestation of the date of the mayor's approval of an ordinance is usually conclusive and cannot be contradicted by parol evidence. The rule in this respect applicable to acts of the legislature is also applicable to ordinances.<sup>11</sup>

Charter power to enact ordinances for improving and keeping street in repair and to assess and collect a tax for such purpose, held sufficient to sustain an ordinance operating on individual property owners; such ordinance is as valid as one providing for general taxation. *Greensburg v. Young*, 53 Pa. St. 280.

8. Chapter on public improvements.

9. Charter of St. Louis, art. III., § 21; Mun. Code of St. Louis (1901, McQuillin), p. 207; Charter of San Francisco, art. II., ch. 1, § 15; Stat. and Amend. to Codes

of Cal. (1899), p. 246; *Standard v. Industry*, 55 Ill. App. 523; *Illinois Central R. R. Co. v. People*, 161 Ill. 244, 43 N. E. 1107; *Nat. Bk. of Commerce v. Grenada*, 44 Fed. 262, reversing 41 Fed. 87; *People ex rel. v. Peoria, D. & El. R. R. Co.*, 116 Ill. 410, 6 N. E. 459; *Los Angeles Co. v. Eikenberry*, 131 Cal. 461, 63 Pac. 766; *Warsop v. Hastings*, 22 Minn. 437; *Janesville v. Dewey*, 3 Wis. 245.

10. *Keane v. Cushing*, 15 Mo. App. 96, 101.

11. *Ball v. Fagg*, 67 Mo. 481, approving *Pacific Railroad Co. v. Governor*, 23 Mo. 353.



Some charters provide that before an ordinance shall take effect it must be published in a manner provided. Such provisions are generally applicable to police and penal ordinances.<sup>12</sup> The publication of ordinances is considered elsewhere.<sup>13</sup>

"The common rule in regard to legislation is, that it shall take immediate effect unless otherwise provided."<sup>14</sup> This rule is applied to ordinances. Thus where publication is not required and there is no time specified either in the charter or ordinance, the ordinance takes effect from the date of its passage.<sup>14a</sup>

12. *State v. Noblesville*, 157 Ind. 31, 60 N. E. 704; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619.

**Publication of ordinances.** "The people are to be informed of the regulations which are to govern them, and time as well as publication is material. The legislature wisely put stress both upon the mode of promulgation and upon the length of time to be allowed, and it would be wrong to abridge this time by construction." Per Graves, J., in *Van Alstine v. People*, 37 Mich. 523, 525.

The owners of signs projecting over the sidewalk are not entitled to other than the general public notice of the enactment of an ordinance prohibiting such signs. *Sands v. Inhab. of Trenton* (N. J. Sup., 1904), 57 Atl. 267.

A charter provision requiring publication of ten days previous notice of the enactment of an ordinance is satisfied by a single publication. *Smith v. Atlanta*, 123 Ga. 877, 51 S. E. 741.

Failure to make publication of ordinances as prescribed by charter will generally invalidate

them. *Barre v. Perry*, 82 Vt. 301, 73 Atl. 574.

13. Ch. 16 *post*.

14. Per Campbell, J., in *Stevenson v. Bay City*, 26 Mich. 44, 49.

14a. *Com. v. McCafferty*, 145 Mass. 384, 14 N. E. 451; *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577; *Com. v. Brooks*, 109 Mass. 355; *Greer v. Jackson*, 127 Ga. 88, 56 S. E. 73; *Paducah v. Ragsdale*, 122 Ky. 425, 28 Ky. L. Rep. 1057, 92 S. W. 13.

Unless restrained by law, the ordinance may provide that it take effect upon its passage. *Johnson v. Finley*, 54 Neb. 733.

**Time fixed by ordinance.** *Kendig v. Knight*, 60 Iowa 29; *Boehme v. Monroe*, 106 Mich. 401; *Roodhouse v. Johnson*, 57 Ill. App. 73.

In England "a byelaw shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall."

"Such a byelaw shall not come into force until the expiration of forty days after a copy thereof, sealed with the corporate seal has been sent to the Secretary of State; and if within those forty

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**§ 667. Same—illustrative cases.**

State constitutions provide that no person shall be punished but by virtue of a law established and promulgated prior thereto and legally applied. This provision has been applied to municipal ordinances prescribing penalties. Where the constitution does not prescribe the mode and time of promulgation, but leaves these matters to the discretion and determination of the law-making power, the implied restriction is that the promulgation shall be reasonably sufficient to accomplish the humane and just purpose of the constitution. This discretion cannot be arbitrarily exercised. A reasonable opportunity must be given to the people within the corporate limits to be informed as to the ordinances they are commanded to obey before they can be punished for their violation. A promulgation that may be insufficient in one community may be sufficient in another, differently circumstanced.

In one case the charter did not prescribe the length of time ordinances should be promulgated before they became operative. But it appeared that the ordinance in question had been published seven days. In sustaining the ordinance, in view of the above constitutional provision, it was said: "The presumption is in favor of the reasonableness of the promulgation, which must prevail in the absence of proof of countervailing facts and circumstances. We cannot affirm, as matter of law, that, on the facts disclosed by the record, the ordinance was not in force at the time of its violation."<sup>15</sup>

Where the charter expressly prescribes that an ordinance shall become a law upon its approval by the mayor,

days the Queen (King), with the advice of her Privy Council, disallow the byelaw or a part thereof, the byelaw or part disallowed shall not come into force; but it shall be lawful for the Queen, at any time within those forty days, to enlarge the time within which

the byelaw shall not come into force, and in that case the byelaw shall not come into force until after the expiration of that enlarged time." 45 and 46 Vict. c. 50, § 23.

15. *Pitts v. District of Opelika*, 79 Ala. 527.

a further charter requirement that all ordinances shall be promulgated by posting or publication for a period of not less than four weeks, does not postpone the operation of an ordinance until after its promulgation.<sup>16</sup>

Under a charter prescribing that every ordinance shall specify the time when it shall take effect, and that no ordinance shall take effect until it has been published for two successive weeks, an ordinance passed, ordained and ordered published on May 5th, which contained a provision that it shall take effect May 16th, and which is published for two weeks, is void, for the ordinance could not, under the charter, be made to take effect May 16th. Hence the time of its taking effect was not prescribed.<sup>17</sup>

A charter providing that all ordinances shall be published for three days successively and shall take effect within ten days after their enactment (provided, however, that the council may fix a different period), and that no ordinance shall take effect before one publication thereof, was construed to "mean that no ordinance can be enforced and violation thereof punished until the public have been informed of its enactment by at least one publication. The matter of publication is only essential before enactment." Therefore, an ordinance which pro-

16. *State v. Anderson*, 26 Fla. 240, 250, 8 So. 1.

17. *When ordinance to take effect.* "It was indispensable that the ordinance should express the time when it would take effect. It was also indispensable that two weeks should be given for notice previous to its taking effect. Both conditions were required. It appears, however, conclusively that the time set for the ordinance to take effect was too short to enable the required notice to be given, and, hence, that the course taken in carry-

ing out one necessary condition made compliance with the other absolutely impossible. This was a violation of the charter. \* \* \* It cannot be admitted that the requirement that two weeks for notice shall elapse before an ordinance shall take effect may be satisfied by publication for two weeks successively, when less than two weeks intervene. The purpose of the provision is not consistent with any such construction." Per Graves, J., in *Van Alstine v. People*, 37 Mich. 523, 525.

vided that it should take immediate effect, which was approved August 2d, was in force on August 10th.<sup>18</sup>

Under a charter providing that all ordinances of a general nature shall take effect within ten days after their publication, an ordinance providing fire limits within a comparatively small portion of territory was held to be such ordinance.<sup>19</sup>

An ordinance requiring animals to be restrained "on and after" May 1st, and which makes it the duty of the marshal to impound them if found at large within the corporate limits "after the above date," does not authorize the impounding on May 1st.<sup>20</sup>

### § 668. Same subject—contingency.

By virtue of the municipal charter and general maxims applicable to municipal administration, the prohibition against delegation of power applies to the several departments and officers of the municipality, as stated and illustrated elsewhere.<sup>21</sup> It thus follows that when an ordinance leaves the legislative body, to be valid, it must be complete.<sup>22</sup> On the question of expediency of the par-

18. *People v. Keir*, 78 Mich. 98, 101, 43 N. W. 1039, per Long, J.

19. *Reynolds v. Harris*, 27 Weekly Law Bul. (Ohio) 229.

Ordinance relating to the sale of intoxicating liquors under particular charter provision. *Schweitzer v. Liberty*, 82 Mo. 309, 315.

Salary ordinances. *Stuhr v. Hoboken*, 47 N. J. L. 147.

Penal ordinances in case where the penalty was imposed by state statute. *Oak Grove v. Juneau*, 66 Wis. 534, 29 N. W. 644.

Publication construed as used in ordinance. *Waukesha Hygeia M. S. Co. v. Waukesha*, 83 Wis. 475.

20. *Frazier v. Draper*, 51 Mo. App. 163.

21. § 382 *et seq. ante*.

22. § 431 *ante*.

**Legislative power cannot be delegated.** "It is a principle not questioned that, except where authorized by the Constitution, as in respect to municipalities, the legislature cannot delege legislative power; cannot confer on any body or person the power to determine what shall be the law. The legislature only must determine what it shall be. The courts only must authoritatively determine what it is." Therefore, a legislative act which leaves it to be determined by the courts

ticular ordinance, the body must exercise its own judgment definitely and finally. Where the law is made to take effect on the occurrence of some specified event, which will not of itself render it invalid,<sup>23</sup> the legislative body must declare it expedient if that event shall happen, but inexpedient if the event shall not happen.<sup>24</sup>

### § 669. Expiration and suspension of ordinances.

A law may be promulgated to continue in force for a specified time only and when such time expires the law ceases as a regulation.<sup>25</sup> But when by-laws or ordinances are not limited as to the time of their operation they never become obsolete, but continue in force until legally

that such act, or any part of it, shall take effect and become law, is void. In such case it does not matter that the act does not profess in terms to confer such power on the courts, if such power is given in substance and effect. *State ex rel. v. Young*, 29 Minn. 474, 551, 552, 9 N. W. 737.

23. Law to take effect on contingency. See §§ 212, 213 *ante*.

Ordinance to take effect on contingency. This rule has been applied to municipal ordinances. *Anderson v. Camden*, 58 N. J. L. 515, 33 Atl. 846; *Nor. Cent. Ry. Co. v. Baltimore*, 21 Md. 93; *State v. Kirkley*, 29 Md. 85; *Baltimore v. Clunet*, 23 Md. 499; *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665; *Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443; *Bradley-Ramsay Lumber Co. v. Perkins*, 109 La. 318, 33 So. 351.

An ordinance for an improvement which provided that it shall not take effect unless within twenty days from its approval a stated sum is deposited with the city

treasurer does not contravene the charter, for an ordinance may be made to depend upon the happening of a future event within a reasonable time after its approval. *Heman Constr. Co. v. Loevy*, 64 Mo. App. 430, 432, 433.

The fact that certain provisions of an ordinance are not to take effect until a specified time in the future does not affect the validity either of the entire ordinance or the particular provisions. *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853.

24. See *Barto v. Himrod*, 8 N. Y. 483, 490.

The determination of a question which by law is committed to the discretion of a council cannot be delegated by that body and made to depend on the judgment of any other officer or person. *Bennison v. Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613.

25. *Chillicothe v. Logan Natural Gas, etc. Co.*, 11 Ohio Dec. 24, 8 Ohio N. P. 88.

repealed or superseded.<sup>26</sup> The fact that the ordinance is not enforced and is repeatedly violated has no effect whatever on its force as law.<sup>27</sup> The corporate authorities have no power to suspend an ordinance nor to authorize a violation of it.<sup>28</sup>

The limitation of time in which a law is to apply is very different from the limitation of time it is to continue in force as a law. When by-laws inflicting penalties expire by their own limitation, or are repealed or superseded, they cease to be law in relation to the past as well as the future, and can no longer be enforced in any case. To use the language of an early New Hampshire case: "No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired. Many laws have been passed which were limited in their operation to particular sea-

26. *Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333; *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532; *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *Bohan v. Weekawken Tp.*, 65 N. J. L. 490, 47 Atl. 446; *Manhattan Trust Co. v. Dayton*, 59 Fed. 327, 8 U. S. Cir. Ct. Rep. 140, affirming 55 Fed. 181; *Shrober v. Lancaster*, 6 Lanc. Bar. (Pa.) 201.

Ordinance duly passed, presumed to be in force. *St. Louis & T. H. R. R. Co. v. Eggmann*, 161 Ill. 155, 43 N. E. 620, 60 Ill. App. 291.

A resolution stands until modified or repealed. *Hawkins v. Litchfield Common Council*, 120 Mich. 390, 79 N. W. 570, 6 Detroit Legal N. 165.

27. *Commonwealth v. Davis*,

140 Mass. 485, 4 N. E. 577; *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532.

28. *Commonwealth v. Worcester*, 3 Pick. (20 Mass.) 462.

Ordinance cannot be suspended or disregarded. An ordinance cannot be suspended by resolution. *People ex rel. v. Mount*, 186 Ill. 560, 578, 58 N. E. 360, C. & N. P. R. R. Co. v. Chicago, 174 Ill. 439, 51 N. E. 596; *Hearst's Chicago American v. Spiss*, 117 Ill. App. 436; *Terre Haute v. Lake*, 43 Ind. 481.

City may suspend an ordinance by ordinance, as one relating to use of fire works. *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

Suspending an ordinance, as one forbidding the discharge of fire

sons of the year. This was the case with the statutes which regulated the hunting of deer, and the taking of fish in rivers and ponds. But it is imagined that no one ever supposed that those laws expired by their own limitation every time the season they were intended to regulate expired and revived again with the return of the season. The same is the case with the statutes regulating the observance of the Sabbath. The statutes apply only to one day of the week. But we imagine no person will contend that they remain in force only during Sunday." In accordance with these views, it was held that a penalty incurred under a by-law of a town made to prohibit horses from going at large during certain seasons of the year, might be enforced after the expiration of the year.<sup>29</sup>

A resolution adopted for a particular and temporary purpose, continues, as a rule, for a reasonable period only, and in such case a formal repeal, of course, is not required to terminate its operation. But if the resolution is in effect an ordinance, and has the force of a local law, it continues to operate until legally rescinded.<sup>30</sup>

works, creates no municipal liability, ch. on municipal liability for torts, *post*.

Exceptions in ordinance. *Emporia v. Shaw*, 6 Kan. App. 808.

Mayor has no power to suspend an ordinance. *Pulver v. State*, 83 Neb. 446, 119 N. W. 780.

Corporate authorities have no power to disregard an ordinance duly enacted except in some manner authorized by law. *Ristine v.*

*Clements*, 3 Ind. App. 338, 66 N. E. 924.

Ordinance may be suspended by petition of voters under initiation and referendum laws. *Ray v. Colby & Tenney*, 5 Neb. 151, 97 N. W. 591.

29. *Stevens v. Dimond*, 6 N. H. 330.

30. *Shaub v. Lancaster*, 156 Pa. St. 362, 21 L. R. A. 691, 26 Atl. 1067; *Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333.

## CHAPTER 16.

## THE ENACTMENT OF ORDINANCES.

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| 681. One subject and title.  | 701. Publication of amendments on passage.               |
| 682. Same—illustrative cases.  | 702. Consideration of mayor's veto.                      |
| 683. Same subject.   | 703. Courts will not inquire into legislative motive.    |
| 684. Same—the provision of the ordinance must not be inconsistent with the title.  | 704. Same—rule limited—ministerial act.                  |
| 685. Title in revision of ordinances.  | 705. Injunction to restrain passage of ordinance.        |
| 686. Preamble.   | 706. Validating void ordinance by municipality.          |
| 687. Ordaining or enacting clause.   | 707. Curative power of legislature over void ordinances. |
| 688. Time of introduction and passage.   | 708. Same—proceedings to subscribe for railroad stock.   |
| 689. Same—double board.  | 709. Same—to collect taxes.                              |



**§ 670. Public corporations empowered to pass ordinances.**

By-laws, ordinances or local laws are enacted by bodies politic and corporate, duly constituted and existing by public law. The kinds of corporations are given in a former chapter.<sup>1</sup> As there stated those public corporations created to conduct the local civil government of specified inhabitants and territory are usually classified as municipal corporations, and to this class is given the power to pass ordinances of various kinds, to better enable the inhabitants thereof to provide all necessary and desirable police regulations, conveniences and comforts.

**§ 671. What body to enact ordinances.**

Under the usual municipal organization in this country the council or governing legislative body is the authority vested with power to enact by-laws, ordinances or local laws, and to pass other legislative acts. But unless restricted by the constitution, the legislature may confer upon any department of the municipal government, as upon the mayor and council, the council alone, or the board of health,<sup>2</sup> board of public works,<sup>3</sup>

1. Ch. 2. The nature and kinds of municipal corporations.

2. Boards of health have power to enact sanitary ordinances having the force of laws within the districts over which their jurisdiction operates. *Polinsky v. People*, 73 N. Y. 65; *People v. Board of Health*, 33 Barb. (N. Y.) 344; *Cushing v. Buffalo Board of Health*, 13 N. Y. St. Rep. 783.

Where the functions of a board of health are executive and administrative, it has no power to pass resolution declaring nuisances. *Marshall v. Cadwalader*, 36 N. J. L. 283.

May grant permit by resolution, when. *Courter v. Newark Board of Health*, 54 N. J. L. 325, 23 Atl. 949.

Resolution declaring nuisance. *Philadelphia v. Houseman*, 2 Phila. (Pa.) 349, 14 Leg. Int. (Pa.) 316.

Notice of passage, when not required. *Yonkers Board of Health v. Copcutt*, 140 N. Y. 12, 35 N. E. 443.

Veto on ordinance of. In re Board of Health, 14 Pa. Co. Ct. 116.

Enforcement of "order" of board of health, to which is at

police board,<sup>4</sup> excise commissioners,<sup>5</sup> etc.,<sup>6</sup> or upon other public bodies,<sup>7</sup> the authority to enact and enforce ordinances. This necessarily results from, and is incidental to the plenary power to create municipal and other public corporations. Such ordinances may be given the force of law in like manner as ordinances duly enacted by municipal corporations proper.<sup>8</sup>

§ 672. The ordinance must relate to corporate as distinguished from private affairs.

“The primary object of municipal ordinances is public, and not private, and their violation is redressed by the legal penalties.”<sup>9</sup> The municipal corporation is strictly a political institution; it is a public corporation for local purposes and also a part of the internal govern-

tached no penalty. *New York Health Department v. Knoll*, 70 N. Y. 530.

3. **Boards of Public Works** may pass ordinances granting franchises to lay tracks for street railways. *State (West Jersey Traction Co.) v. Board of Public Works*, 56 N. J. L. 431, 29 Atl. 163.

4. **Police Board.** In Boston the police board may be empowered by the legislature to regulate the use of streets in certain respects. *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224.

5. **Excise department.** Certain of the local police powers may be conferred by the legislature upon certain city departments, as the excise commissioners. *State (Riley) v. Trenton*, 51 N. J. L. 498, 18 Atl. 116; *State (Paul) v. Gloucester*, 50 N. J. L. 585, 15 Atl. 272; *State (Hankinson) v. Trenton*, 51 N. J. L. 495, 17 Atl.

1083; *Crocker v. Camden B. of Excise Comrs.*, 73 N. J. L. 360, 63 Atl. 901.

6. **Police jury** may pass ordinances. *Davis v. Caldwell*, 28 La. Ann. 860.

7. **County board of supervisors.** *People v. Bailhache*, 52 Cal. 310.

State may create metropolitan sanitary districts. *Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

Police districts. *People v. Draper*, 15 N. Y. 532.

8. Ordinances of board of health have the force of law. *People ex rel. v. Court of Special Sessions Justices*, 7 Hun (14 Sup. Ct.) 214.

See § 643, *ante*.

9. Per *Campbell, J.*, in *Cook v. Johnson*, 58 Mich. 437, 25 N. W. 388; *Taylor v. Lake Shore and Michigan Southern Ry. Co.*, 45 Mich. 74, 7 N. W. 728, 9 Am. & Eng. Ry. Cas. 127.

ment of the state. All its objects are public, and the powers it exercises, if not inherent in it, or delegated to it by the state, would reside in the state. As stated elsewhere the legal view is that, as created, the corporation falls precisely within the definition of a municipal corporation given in an early English case, "an investing the people of the place with the local government thereof."<sup>10</sup>

"Private gain, trading, speculation, or the derivation of pecuniary profit, are not purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage or advance such purposes, further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government."<sup>11</sup>

Therefore a by-law will be held bad when it appears to have been passed not to subserve the interests of the corporation, that is, the public, but those of some private person or class of persons.<sup>12</sup> Thus an ordinance designed to preserve private property is beyond the province of the municipal corporation; that protection

10. *Cudon v. Eastwick*, Salk. 192.

11. *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611, 624; *Nashville v. Ray*, 19 Wall. (U. S.) 468, 475, 22 L. Ed. 164.

§§ 87, 88 *ante*.

12. *In re Peck and Town of Galt*, 46 Up. Can. Q. B. 211, 220.

**Not in public interest.** Local improvement by-law held not in public interests and void. *Pells v. Boswell*, 8 Ontario Rep. 680.

By-law opening a lane held not passed in public interest, but simply to subserve interest of an individual. *In re Morton & City of St. Thomas*, 6 Ontario App. 323.

A by-law provided for the drain-

age of lands, but it appeared that the corporation intended to remedy a private grievance, and hence the by-law was held bad. *Re Tp. of Romney and Tp. of Mersea*, 11 Ontario App. 712, 723.

By-law to indemnify a councilman for the expenses of an election contest, held not in public interest. *Re Bell v. Tp. of Manvers*, 2 Up. Can. Com. Pleas 507, 2 Up. Can. Com. Pleas 400.

Where the by-law depended upon the vote of a member of a council who was interested, it was set aside. *Hewison v. Tp. of Pembroke*, 6 Ontario Rep 170.

See § 599 *ante*.

must be enforced under the laws of the land.<sup>13</sup> "In no instance can a municipal corporation delegate power to private individuals to be exercised for their own private benefit, to do injury to the property of their neighbors, and relieve them from responsibility for the damages they may occasion, or reduce their liability to such as may result from want of proper care."<sup>14</sup> So an ordinance cannot interfere with arrangements made by a railroad company with an omnibus company for the delivery of passengers and their baggage, which arrangements are not unlawful in themselves, and which relate to the cars of the company on its own premises.<sup>15</sup>

### § 673. Ordinances regulating civil rights and liabilities.

In a New York case it is declared to be an axiomatic truth that every person while violating an express law, whether statute or ordinance, is a wrong-doer, and, as such, *ex necessitate* negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes a violation of the law is entitled to a civil remedy for such injury, notwithstanding any redress the public may have.<sup>16</sup> Prior to this declaration

13. To preserve property from encroachment in case of wharves. *Horn v. People*, 26 Mich. 221, per Campbell, J.

14. *Mairs v. Manhattan Real Estate Assn.*, 89 N. Y. 498, 506, per Rapallo, J.

15. *Napman v. People*, 19 Mich. 352.

Unlawful interference with private property. *District of Columbia v. Saville*, 1 Mac Arthur (D. C.) 581, 29 Am. Rep. 616.

Municipal interference with rights of owner of lot to maintain surface at any grade desired if no nuisance is created by so doing, denied. *Bush v. Dubuque*, 69 Iowa 233, 28 N. W. 542.

16. This rule was declared in *Jetter v. New York & H. R. R. Co.*, 2 Abb. Ct. App. Dec. (N. Y.) 458, 464, 2 Keyes 154, in overruling *Brown v. B. & S. L. R. R. Co.*, 22 N. Y. 191.

**Ordinances concerning civil rights and liabilities.** This case is limited by later New York cases. *Massoth v. D. & H. Canal Co.*, 64 N. Y. 524, after reviewing the cases, concludes that it is an open question in New York whether the violation of a municipal ordinance is negligence *per se*.

In *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, the New York cases are considered and the conclusion stated: "The result of the

many cases had affirmed that where a person is required by statute to do a named act, and fails, any person specially injured by the neglect is entitled to recover his damages in an action on the case, if no other remedy is given, and that, too, even when the statute imposes a penalty for its violation.<sup>17</sup>

Whether such action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed."<sup>18</sup> "The nature of the duty and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit."<sup>19</sup> In a case of an ordinance passed by virtue of a special legislative grant, requiring railroads to fence their tracks within the corporate limits, it is said: "The duty is due, not to the city as a municipal corporation, but to the public, considered as composed of individual persons; and each person specially injured by the

decisions, therefore, is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence."

17. *Couch v. Steel*, 3 El. & B. (77 Eng. C. L. Rep.) 402, 411, per Lord Campbell, C. J.; *Steam Navigation Co. v. Morrison*, 13 Com. Bench (N. S.) (76 Eng. C. L. Rep.) 581, 594, per Williams, J.; *Caswell v. Worth*, 5 El. & B. (85 Eng. C. L. Rep.) 848, 855, 856, per Coleridge, J.; *Atkinson v. New Castle & G. Waterworks Co.*, L. R., 6 Exch. 404; *Ashby v. Elsberry & New Hope Gravel R. Co.*, 99 Mo. App. 178, 185, 73 S. W. 229.

Failure to protect hatchway as

required by statute. *Parker v. Bernard*, 135 Mass. 116.

Obstruction of highway by railroad in violation of statute. *Patterson v. Detroit, etc., Ry.*, 56 Mich. 172, 22 N. W. 260.

Rule applied where statute related to erection of wooden buildings in a city and which was violated to special injury of plaintiff. *Aldrich v. Howard*, 7 R. I. 199, 213.

18. Per Lord Cairns in *Atkinson v. Newcastle Waterworks Co.*, L. R., 2 Exch. Div. 441.

19. *Taylor v. L. S. & M. S. R. R. Co.*, 45 Mich. 74, 40 Am. Rep. 457, 9 Am. & Eng. Ry. Cas. 127; 7 N. W. 728, per Cooley, J.

breach of the obligation is entitled to his individual compensation and to an action for its recovery.”<sup>20</sup>

In actions for common law negligence, evidence that plaintiff violated a statute or ordinance is admissible for the purpose of showing negligence on his part. Likewise in such actions, the cases hold, with few exceptions, that for the purpose of showing defendant's negligence it is competent to introduce in evidence the statute or ordinance and prove that the same was violated by defendant. The application of these well-established rules is considered in a subsequent chapter.<sup>21</sup>

Failure to observe an ordinance requiring certain precautions in blasting rock has been held sufficient evidence to support an action in behalf of one damaged because of such violation.<sup>22</sup> In such case the court observed: “The only undisputed negligence shown was in the omission to obey the requirements of the ordinance. The ordinance was a wise and valid regulation, made for the protection of persons and property from injury. If its provisions had been observed this injury to plaintiff would not probably have occurred. The disregard of the ordinance was in itself an omission of duty, sufficient to justify a verdict for plaintiff against the person who was guilty of the negligent omission.”<sup>23</sup>

An ordinance which provides that “conductors shall not allow ladies and children to enter or leave cars while in motion” cannot abrogate the rule of law that when the negligence of a party proximately and directly causes or contributes to his injury he has no just claim for damages from another whose negligence to some extent contributed thereto.<sup>24</sup>

20. Per Mr. Justice Matthews in *Hayes v. Mich. Cent. R. R.*, 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. Ed. 410.

21. Ch. 23. Evidence of municipal ordinances.

22. *Devlin v. Gallagher*, 6 Daly (N. Y.) 494, 496.

23. *Brannock v. Elmore*, 114 Mo. 55, 59, 21 S. W. 451.

24. *Shareman v. St. Louis Transit Co.*, 103 Mo. App. 515, 529, 78 S. W. 846.

So municipal corporation cannot legislate on the weight and effect of evidence. Thus an ordinance which declares that the entrance or exit of any person from a saloon during the hours specified that the same should be closed should be *prima facie* evidence of its violation is beyond the power of the local corporation to enact.<sup>25</sup>

In an action for damages resulting from plaintiff falling into a hole in the street, it appeared that defendant had failed to comply with the requirements of an ordinance relating to the mode in which vaults in streets should be protected. The court, in holding that this circumstance affected the defendant, said: "The doing of any unlawful act subjects the doer to every consequence which flows from it. This is the principle of universal operation, and founded in good sense and public justice."<sup>26</sup>

In an action for damages occasioned by the blowing down of a sign by the wind in an extraordinary gale, which sign had been suspended over a street with due care as to its construction and fastenings, but in violation of an ordinance which subjected its owner to a penalty for placing and keeping it there, it was held that this illegal act contributed to plaintiff's injury.<sup>27</sup> While the ground of such liability is negligence, it seems that the act of defendant in wrongfully placing the sign, in the opinion of the court, alone rendered him liable. This act was in violation of the rule of conduct in such cases which had been established by ordinance. If no municipal regulation had existed on the subject, and the view had been adopted that the sign had been rightfully placed where it was, the only question would have been presented, whether defendant had used due care in securing it. If he had done so, the damage would have been caused, without his fault, by the extraordinary and

25. McNulty v. Toopf, 25 Ky. L. Rep. 430, 75 S. W. 258.

27. Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

26. Owings v. Jones, 9 Md. 108, 117.

unusual gale of wind, and thus, having been produced by the *vis major*, plaintiff would have had no remedy. To adopt the illustration of the court: A chimney or roof properly constructed and secured with reasonable care may be blown off by an extraordinary gale and injure a neighbor's building; but this is not a ground of action.<sup>28</sup> Hence, in determining the question whether in these and like cases the ordinance creates the liability, it is important to consider whether, in the absence of the ordinance, what was done or omitted by defendant constituted a want of due care. Here the wrongful act of suspending the sign over the street was the proximate cause of the damage, and, therefore, the specific negligent act of defendant. If such act was in itself wrongful and in violation of the legal rights of plaintiff, it is clear that the cause of action does not rest upon the ordinance. But if, on the other hand, it was wrongful only because prohibited by a reasonable police regulation, admittedly within the jurisdiction of the local corporation, it follows that the ordinance created a new civil liability.

An ordinance of the City of St. Louis regulating the operation of street cars which provided that "conductors shall not allow ladies or children to leave or enter cars while the same are in motion," was sustained against the contention that the violation of the duty prescribed on the part of the carrier creates a civil liability against it in favor of the passenger. The court expressed the opinion that the ordinance was in the nature of a police regulation designed to protect the safety of

28. "But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. He placed and kept it there illegally, and this illegal act of his has con-

tributed to the plaintiff's injury. The gale would not of itself have caused the injury if the defendant has not wrongfully placed this substance in its way." *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.



passengers upon street cars, and hence, it was within the power of the city, under its charter, to pass.<sup>29</sup>

### § 674. Same—civil action for breach of ordinance.

Some cases assert that the breach of duty arising from the violation of the statute in one case, and the ordinance in the other, is of the same nature, and the consequences the same, as relating to the duty which the defendant owes to individuals, as, for example, their safety in using the streets. Thus an ordinance requiring teams attached to vehicles to be fastened or hitched when left standing unattended in the streets, has been held "to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof as in the case of like statutory duty."<sup>30</sup> As respects the point under consideration, some cases have extended the analogy between statutes and ordinances further. In support, the well-established principle is invoked that an ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as a statute or other law of the state, and all persons bound thereby are required to take notice of its existence. Thus a petition was held good, on demurrer, which founded the cause of action for damages for destruction of property upon an ordinance relating to the keeping of crude petroleum, naphtha, etc., which defendant had violated, and which breach of duty caused the loss.<sup>31</sup>

29. *McHugh v. St. Louis Transit Co.*, 190 Mo. 85, 96, 88 S. W. 853; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648. Reviewing the authorities.

30. *Bett v. Pratt*, 33 Minn. 323, 328, 23 N. W. 237, 53 Am. Rep. 47, sustaining an instruction which charged the jury, in substance, that if they should find that defendant left his horse unhitched in the street, in violation

of the ordinance, and the damage to the plaintiff was occasioned thereby the liability of the defendant was established.

31. The court quoted, as follows: "It is founded," says Chief Baron Comyns, "upon a wrong. In all cases, where a man has temporal loss or damage by the injury of another, he may have an action on the case." Com. Dig. tit., Action on the Case, A. The

In an action to recover damages for personal injuries sustained by plaintiff in falling through an elevator opening in defendant's establishment, an instruction was approved which declared that it was the duty of defendant to provide a gate or railing to the elevator hatchway, as required by an ordinance, and that a failure to do so was negligence.<sup>32</sup> Subsequently the same court, in affirming the principle of the last case, that an ordinance could afford a basis for a civil action, sustained a petition against a demurrer in an action for damages for the death of a child, occasioned by falling into a hatchway on premises owned by defendant, wherein it appeared that defendant had failed to comply with the provisions of an ordinance which required that the hatchway should be protected so as to prevent any one from falling into it. The theory of the petition was that the ordinance prescribed a rule of conduct for the violation of which a defendant could be held in damages to a third person.<sup>33</sup>

court then said: "This injury may be caused by the unlawful act of another, or from the careless and negligent manner in which a lawful act is performed." \* \* "It cannot be doubted that it is competent for the legislature of this state to delegate to municipal corporations, like Chicago, the power to pass ordinances; and it is well settled that such ordinances, when within the legislative authority given, have the force, as to all persons bound by them, of laws passed by the legislature of the state." *Wright v. C. & N. W. R. R. Co.*, 7 Ill. App. 438, 445, 446.

32. While it was stated that the ordinance was valid, the defendant was obliged to obey it, and was liable for failure to do so, the "whole ordinance might have been dropped out of this case en-

tirely without affecting its merits." *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 540, 65 S. W. 737. (In a court composed of seven judges, three dissented.)

33. *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194, 69 S. W. 368.

Failure to observe ordinance as to guarding hatchway constitutes negligence. *Ryan v. Thomson*, 6 Jones & S. (38 N. Y. Sup. Ct.), 133.

An ordinance of the City of St. Louis required every person, who made an excavation in or adjoining any public street, to fence the same with a substantial fence not less than three feet high, etc. Held that such an ordinance can only be made the basis of a civil liability when it rests upon, and has for its object, the enforcement

## § 675. Same—limitation—duty to public.

It is clear that ordinances of this character cannot be extended beyond the proper limits of municipal jurisdiction. In so far as they are designed to preserve the life and limb of those within the corporate limits, they will be sustained as proper police regulations, and where individuals suffer damage by reason of the violation of certain of such ordinances, as we have seen, some cases hold that the one in default is subject to civil action on the theory that the duties enjoined by such regulations are due not alone to the public in its corporate capacity, but also to individuals as such. On the other hand, where the duty imposed is due alone to the corporation as a legal entity, an ordinance passed in pursuance of the police power and carrying its own punishment, as for a misdemeanor, for its violation, cannot create a civil liability. Such ordinance does not constitute a rule of conduct binding third persons *inter sese*, and therefore cannot create a civil liability against a person violating it and in favor of one damaged by such violation. The only liability for infraction is the penalty imposed.<sup>34</sup>

in a particular way of an obligation imposed by the general law; and held, further, that the ordinance came within this principle, in that an obligation to guard such an excavation existed at common law, and the ordinance merely prescribed that this obligation should be discharged in a certain manner. *Jelly v. Pieper*, 44 Mo. App. 380, per Biggs, J.

An allegation that defendant by sliding in the street in a boisterous manner in violation of an ordinance and to the damage and common nuisance of the public frightened plaintiff's horses so that they ran away and were injured, held to state no cause of

action. *Jackson v. Castle*, 82 Me. 579, 20 Atl. 237.

34. *Connecticut*. *Hartford v. Talcott*, 48 Conn. 526, 40 Am. Rep. 189.

*Illinois*. *Brink's Chicago City Exp. Co. v. Kinnare*, 168 Ill. 643, 67 Ill. App. 498, 48 N. E. 446.

*Iowa*. *Keokuk v. District of Keokuk*, 53 Iowa 352, 5 N. W. 503.

*Kansas*. *Chicago, etc. R. R. Co. v. Kennedy*, 2 Kan. App. 693.

*Maryland*. *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

*Minnesota*. *Bott v. Pratt*, 33 Minn. 323, 327, 23 N. W. 237.

*Missouri*. *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194, 200, 69 S. W. 368; *Saunders v. So. Elec-*

Thus owners of land abutting on streets are held liable to the corporation alone for breach of ordinances requiring the removal of snow and ice from the sidewalk within a specified time after the fall thereof. The ground is that it is the sole duty of the city to keep its streets in condition for travel, and not the duty of private persons.<sup>35</sup> The owner of property fronting on a

tric R. R. Co., 147 Mo. 411, 427, 48 S. W. 855; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 650, 36 S. W. 659, 56 Am. St. Rep. 543; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Becker v. Schulte*, 85 Mo. App. 57; *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242.

*New York.* *Moore v. Gadsden*, 93 N. Y. 12.

*Ohio.* *Administrator of Chambers v. Ohio Life Ins. Co.*, 1 Disney (Ohio) 327, 336.

**Ordinance as evidence.** Breach of ordinance is merely evidence of negligence to be considered with other facts in the case. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488.

Ordinance cannot authorize encroachment in streets, and thus relieve those erecting or maintaining them from civil liability. *New York v. Heft*, 13 Daly (N. Y.) 301.

An ordinance cannot give the city a right of action on account of damages to private property, as ornamental shade trees. *Goshen v. Cray*, 58 Ind. 268.

35. **No civil liability against land owner abutting on street for failure to remove snow and ice.** The remedy is exclusively against the inhabitants of the city in their corporate capacity. *Kirby v. Boylston Market Association*, 14

*Gray (Mass.)* 249, 74 Am. Dec. 682.

"The ordinance was not intended for the benefit of the plaintiff, as an individual, or as one of a particular class, but for the public at large." *Flynn v. Canton*, 40 Md. 312, 323, 17 Am. Rep. 603, 614.

"In this case the duty was to keep the sidewalk free from obstruction. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walk. The duty to build the walk is only a public duty, and the duty to keep it in a condition for use is also a public duty." *Per Cooley, J.*, in *Taylor v. L. S. & M. S. Ry. Co.*, 45 Mich. 74, 77, 77 N. W. 728, 9 Am. & Eng. Ry. Cas. 127, 40 Am. Rep. 457.

In *Van Dyke v. Cincinnati*, 1 Disney (Ohio) 532, the action was against one H., the abutter, and the city. In denying liability of the property owner, the court said: "As the owner of adjacent property there was no common law duty upon the defendant H. to remove the obstruction (snow and ice). It is not claimed that he is a public officer charged with the performance of this particular duty, and no statutory liability is shown. \* \* \* So far as it is claimed

street is not liable to the corporation for damages recovered of the latter by one for injuries received by falling on the ice on the sidewalk in front of such property, notwithstanding an ordinance required the owner to keep his sidewalk free from ice and snow, and prescribed a penalty for its violation.<sup>36</sup>

that the enactment of such an ordinance creates a positive duty on the part of the owners of the property to clear their sidewalks of the obstructions named, the neglect of which is to make them answerable for the consequences to such as may suffer therefrom, no matter to what extent, we deny that the city council has the power to impose any such obligation. \* \* \* The ordinance imposed upon H. a duty to the public alone which can only be enforced by the penalty prescribed, and the non-compliance of which does not subject him to a civil action at the suit of a private person."

After commenting on the English cases, sustaining liability by virtue of statutes, it is said in a Rhode Island case: "But even if the liability had its origin in the common law, we do not find that it has ever been held to extend to a neglect of duty enjoined simply by a municipal ordinance and we think there are reasons why it should not extend it. The power to enact ordinances is granted for particular local purposes. It includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex any civil liability. The power, being delegated, should be strictly con-

strued. It would seem, therefore, that the mere neglect of a duty prescribed in the exercise of such a power should not be held to create as a legal consequence, a liability, which, within its power, could not be directly imposed." *Heeney v. Sprague*, 11 R. I. 456, 462, 23 Am. Rep. 502, distinguishing *Jones v. Firemen's Fund Ins. Co.*, 2 Daly (N. Y.) 307, and *Bell v. Quin*, 2 Sandf. (N. Y.) 146.

City cannot impose duty on abutter to keep sidewalk free from obstruction by snow, ice, etc. *Gridley v. Bloomington*, 88 Ill. 554; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

36. *St. Louis v. Conn. Mutual Life Ins. Co.*, 107 Mo. 92, 17 S. W. 637.

**Basis of liability is negligence.** The lot owner is not liable unless he has been negligent by obstructing the sidewalk or excavating under it. *Jansen v. Atchison*, 16 Kan. 358, 384, per Brewer, J.

Where the corporation is, by statute or charter, exempted from liability for defective sidewalks, streets, etc., the abutting property owner cannot be held liable for damages to one injured. *Eustace v. Jahns*, 38 Cal. 3, 21.

Agreement to keep sidewalk in repair, held sufficient to render property owner liable to city for failure to do so. *Brookville v.*

Individuals are liable for any injuries they may do by interfering with the safety and convenience of travelers.<sup>37</sup> If what they do constitutes a nuisance or tort, and actionable as such at common law, they may be held liable for all resulting damages, irrespective of ordinance regulation on the subject. Thus where one creates a nuisance or obstruction in a public highway,<sup>38</sup> or suffers snow and ice to accumulate upon an awning placed by him over a sidewalk, and the awning being insufficient to hold the snow and ice, gives way and damages a pedestrian,<sup>39</sup> he is responsible in damages for any injury in consequence thereof. The liability in these and like cases rests alone on negligence, the defendant in each instance being the author of the illegal act, and the tort consists in the violation of the legal rights of the one who suffers damages—rights recognized under the general principles of law and not created by ordinance.<sup>40</sup>

Arthurs, 130 Pa. St. 501, 18 Atl. 1076.

It is the duty of the city to keep its streets in a reasonably safe condition for persons traveling thereon. *Kiely v. Kansas City*, 87 Mo. 103.

This duty cannot be evaded, suspended or cast upon others by any act of the corporation. *Russell v. Columbia*, 74 Mo. 480; *Welsh v. St. Louis*, 73 Mo. 71.

37. *Shipley v. Fifty Associates*, 101 Mass. 251, 252.

38. *Smith v. Smith*, 2 Pick. (Mass.) 621; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Dobson v. Blackmore*, 9 Ad. & El. 991.

39. *Milford v. Holbrook*, 9 Allen (Mass.) 17.

40. **Owner liable when negligent—illustrations.** Owner of building liable for damages from sliding mass of ice and snow from roof upon travelers. *Shipley v. Fifty Associates*, 101 Mass. 251.

A building so erected that its roof overhangs the street is a nuisance and snow and ice falling therefrom creates a liability. *Garland v. Towne*, 55 N. H. 55.

Abutting property owner, who turns water from his building onto the sidewalk by means of gutters or spouts, is jointly liable with the city if he fails to exercise reasonable care to guard pedestrians from injury resulting from the formation from such water of ice upon the sidewalk. *Reedy v. St. Louis Brewing Association*, 161 Mo. 523, 533, 61 S. W. 859.

Making a manhole for the reception of coal by abutter renders him liable, where the same is left unguarded and one falls therein. *Benjamin v. Met. St. Railroad Co.*, 133 Mo. 274, 34 S. W. 590.

Making and maintaining an opening or area in a lot at the

But the failure of the abutting property owner to remove snow, which has fallen on the sidewalk, has never been recognized as a ground of action for damages for resulting injuries at common law. The snow is not created by the act of the defendant, nor is it placed upon the pavement by his act or by the act of any agency over which he has control. Under the rule of the common law there is no obligation imposed upon him to remove it. As stated in a Rhode Island case: "We do not suppose that the creation of a civil liability between individuals was any part of the object for which the power to enact ordinances was granted."<sup>41</sup>

The principle involved is well illustrated in a Pennsylvania case. An ordinance of Philadelphia required the owners of wharves on the Schuylkill and Delaware Rivers to put in and maintain cap-logs upon them to a height of not less than eight inches. A *narr* declared upon the ordinance as raising a duty which defendant company

street line. *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219.

Excavation which renders highway unsafe. *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104; *Wiggins v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Jelly v. Pieper*, 44 Mo. App. 380.

Any act which renders the street hazardous creates liability. *Heer Dry Goods Co. v. Citizens' Ry. Co.*, 41 Mo. App. 63; *Bailey v. Culver*, 84 Mo. 531; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210.

Liability for electric wires along public streets. *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502, 46 S. W. 968; 47 S. W. 907.

41. *Heeney v. Sprague*, 11 R. I. 456, 461, 23 Am. Rep. 502.

Ordinance cannot create civil liability. "Speaking for myself alone, my views have not changed in the least, and I am still of

opinion that such ordinances do not constitute a rule of conduct binding third persons *inter sese*, but are mere police regulations carrying their own punishment for their violation, and that punishment a fine, and that they are not admissible in evidence at all in an action based upon common law negligence, for no utterance of a municipal assembly can be evidence of common law negligence. But as the majority of this court, *in banc*, holds otherwise, as to such ordinance affording the basis for a civil action the proper administration of the law requires that such decision shall be obeyed and followed by all the members of the court until the court otherwise rules." *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194, 200, 69 S. W. 368, per Marshall, J.

was bound to observe, and laid the damages resulting from the loss of a horse and cart as a consequence of the neglect of such duty. In holding that there was no cause of action, the court observed: "Let us suppose that these wharves were so constructed that *extra* ordinance, no charge of negligence could arise, and hence no common law action would lie; would disobedience to this regulation, of itself, subject the company to such charge and action? This question would seem almost to answer itself; for if it is affirmed, then may civil duties and civil remedies be given or taken away by ordinances; a power as yet quite beyond the reach of municipal legislation. The national or state legislature may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence, but the city of Philadelphia has no such power. Its ordinances are but police regulations enforceable by penalties, recoverable by actions of debt or otherwise, as may be prescribed, but if not so enforced they come to nothing. An ordinance may forbid the maintenance by my neighbor of a cesspool upon his premises, and it may, by penalty, compel him to abate it, but whether it does so or not, I may; if I am damaged thereby, have my common law action against him; but if I am not damaged I am without remedy. In this the ordinance neither helps nor hinders."<sup>42</sup>

42. Philadelphia and Reading R. R. Co. v. Ervin, 89 Pa. St. 71, 75, 76, 33 Am. Rep. 726, per Gordon, J.

As to right of action to enjoin continuance of wooden building forbidden by ordinance. McCloskey v. Kreling, 76 Cal. 511, 18 Pac.

433; Oldstein v. Fireman's Building Assn., 44 La. Ann. 492, 10 So. 928.

Where licensed porter loses luggage, action will lie on his bond. Chillicothe v. Raynard, 80 Mo. 185.



### § 676. Charter method of enactment exclusive.

To validate the ordinance, the mode prescribed by the charter for its enactment must be observed.<sup>43</sup> But "a city ordinance, passed in pursuance of charter authority, is not necessarily invalid because it omits some of the details of method or procedure mentioned in the charter," unless the charter makes such omission fatal.<sup>44</sup>

Prior to the introduction for passage of ordinances relating to public work and improvement which are to be paid for by special assessment or taxation (as sometimes termed), certain preliminary steps are usually required, as notice by advertisement of the contemplated work; public hearing; establishment of benefit, assessment or taxing districts; determination of protests or remonstrances; recommendation of the proposed ordinances by a designated board or department and estimate of the cost of the work endorsed thereon. These and like requirements are regarded as conditions precedent to final action on the ordinance; they are jurisdictional in their nature and non-compliance with them leaves the council without power to adopt the ordi-

43. *California*. McCoy v. Briant, 53 Cal. 247, 250.

*Illinois*. Fuller v. Heath, 89 Ill. 296; Elizabethtown v. Lefler, 23 Ill. 90.

*Kansas*. Mo. Pac. R. R. Co. v. Wyandotte, 44 Kan. 32, 23 Pac. 950.

*Missouri*. Lewis v. St. Louis, 4 Mo. App. 563.

*Ohio*. Welker v. Potter, 18 Ohio St. 35.

*Vermont*. Williams v. Willard, 23 Vt. 369.

*Virginia*. Danville v. Shelton, 76 Va. 325.

*Washington*. Savage v. Tacoma (Wash., 1910), 112 Pac. 78.

*England*. Dunstan v. Imperial Gas Light, etc. Co., 3 Barn. & Adol., 125, 23 Eng. Com. L. 42.

The charter power of a municipal corporation to enact ordinances on specified subjects is to be strictly construed, and the exercise of the power must be confined within the general principles of the law applicable to such subjects. St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984.

44. St. Louis v. Stern, 3 Mo. App. 48; Bluefield v. Johnson (W. Va., 1910), 69 S. E. 848; Rockville v. Merchant, 60 Mo. App. 365.

nance.<sup>45</sup> This doctrine is more frequently applied in the passage of ordinances, resolutions and orders authorizing and providing for street and sewer construction and reconstruction and other public improvements, and will be found fully treated in the chapter on public improvements.

### § 677. Form of ordinance.

Of course, the ordinance must be in writing as the legislative will can be expressed in no other manner.<sup>45a</sup> And it seems equally unnecessary to state that the English language should be employed.<sup>46</sup>

45. *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *State v. Plainfield*, 38 N. J. L. 95; *In re Douglass*, 46 N. Y. 42; *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640; *Quint v. Merrill*, 105 Wis. 406, 81 N. W. 664.

**Discretion of council.** Where the details of municipal legislation are left to the discretion of the council such discretion must be reasonably exercised, otherwise the legislation will be declared void. *Murphy v. Chicago*, etc. Ry. Co., 247 Ill. 614, 93 N. E. 381.

**New definitions.** The common council of a city has no power to prescribe new definitions for terms which already have legal definitions. *Allport v. Murphy*, 153 Mich. 486, 491, 116 N. W. 1070, 15 Det. Leg. N. 496.

45a. *Stevenson v. Bay City*, 26 Mich. 44; *Vanderbeck v. Ridgewood*, 50 N. J. L. 514, 14 Atl. 598.

**By-law of private corporation, not in writing, held good.** *Holly Springs Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

46. **Ordinance should be in the English language.** *Breaux's Bridge v. Dupuis*, 30 La. Ann. (pt. 2), 1105, holding that the constitutional provision of Louisiana commanding that all laws and legislative proceedings shall be promulgated and preserved in the English language applied to acts of town councils. Hence, an ordinance in the French language only was held void.

In a case decided in 1831, an ordinance promulgated in French only was held valid, but this resulted from the construction of the Louisiana constitution of 1812, and is distinguished from the constitution of 1868 in the case above cited. The constitution of 1812 prescribed the use of the English language, in the promulgation and preservation of all laws passed by the legislature, the public records of the state, the legislative and judicial written proceedings of the same. The court was of the opinion that that constitutional provision could not, without too forced a construction,

Charters sometimes provide that the ordinance shall be complete in the form in which it is finally passed. Under such requirement a recital in the minutes of the council that a named councilman presented a petition requesting permission to do a specified act, namely, to erect a fence around a portion of the property upon which a new building was to be erected, with a recommendation from a designated municipal board that the request be granted, and that, on motion the same was granted does not constitute an ordinance.<sup>47</sup>

Where no particular form is prescribed any form of expression may be adopted which clearly signifies the corporate will that the ordinance or by-law exists and which plainly indicates its terms and the object to which it is intended to apply. In an early New Hampshire case, the record of the town meeting showed that it was "voted, to collect fines of one dollar of all persons riding or driving across the village bridge or salmonhole bridge, faster than a walk, agreeably to an act passed January 13, 1837." In sustaining the by-law, the court observed: "It is apparent from this record that the question came regularly before the town, whether they would adopt by-laws to impose fines, in pursuance of the statute, upon persons who should improperly ride or

be extended to the by-laws and ordinances of corporations. "Whatever force and effect such by-laws and ordinances may have, they are not laws passed by the legislature of the state." *Loze v. New Orleans*, 2 La. 427.

The "ordinance imposing the license \* \* \* is a law, a legislative proceeding, and though its promulgation in the language understood and spoken in the locality wherein it was adopted was proper and authorized, the 109th article of Constitution of 1868, which differs from sec. 15 of title

VI of the state constitution of 1812, commands that all laws and legislative proceedings shall be promulgated and preserved in the English language. \* \* \* Now, unless promulgated and preserved in the English language, no law or ordinance, whether passed by the legislature or town council, can have any binding effect." *Breaux's Bridge v. Dupuis*, 30 La. Ann. (pt. 2) 1105.

47. *American Constr. Co. v. Seelig* (Tex. 1911), 133 S. W. 429, 431

drive across the bridges described in the warrant, and that they voted to do so, in terms that can admit of no mistake or doubt. It would therefore seem that the by-law was by that vote adopted. No particular form was prescribed by the statute in which the law should be engrossed, and there seems to be no law or custom restraining the towns from selecting such form of expression as suits them, provided enough be contained to signify their will that the by-law exists and to indicate the terms of it, and the objects to which it should apply. \* \* \* A great variety of forms may be found in the history of legislation for the expression of the legislative will, that have never been called in question, and that are as unlike to each other as the form used in this case is to any of them."<sup>48</sup>

As we have seen, an ordinance in the form of a resolution is not necessarily invalid.<sup>49</sup> However, if such resolution wants the solemnities of an ordinance it cannot be regarded as a legislative equivalent.<sup>50</sup>

Many charters adopt the usual constitutional requirement and provide that "no ordinance shall be passed except by bill."<sup>51</sup>

An ordinance establishing grades of streets may properly refer to maps and books on file in a public office, as a part thereof.<sup>52</sup> So a prior ordinance may be incorporated in a subsequent ordinance and be carried forward by appropriate language.<sup>53</sup>

48. *Lisbon v. Clark*, 18 N. H. 234, 238, per Gilchrist, J.

By-law of private corporation, held good, not in writing. *Holly Springs Bank v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

49. § 636 *ante*.

50. *Paterson v. Barnet*, 46 N. J. L. 62, 66.

51. Charter San Francisco, art. II, ch. 1, § 8; Statutes and Amendments to Codes of Cal. (1899), p. 245; Charter St. Louis,

art. III, § 13; Mun. Code of St. Louis (1901, McQuillin), p. 205; The Revised Code of St. Louis (1907, Woerner), p. 310.

52. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253.

53. *Baumgartner v. Hasty*, 100 Ind. 575, 586, 50 Am. Rep. 830, per Elliott, J.

A statute may be carried forward by reference to the general subject. *Opp. v. Ten Eyck*, 99 Ind. 345.

**§ 678. The formal parts of an ordinance enumerated.**

The formal parts of a complete penal ordinance are:

1. The title.
2. The preamble, or reason for passage (not usual).
3. The ordaining or enacting clause.
4. The command to do (and sometimes the manner of doing it) or not to do, and designation of subjects and objects of operation.
5. The penalty.
6. Naming the time when to take effect; in the absence of charter provision or in case of emergency, it should be declared.<sup>54</sup>

In administrative, franchise and improvement ordinances the form will vary with the subject-matter and the experience and taste of the framer. In franchise ordinances the reservation of the right of the municipal corporation to change, alter and repeal is usually incorporated.

In penal ordinances, especially of towns and villages, formality is not always observed and sometimes all parts are thrown into one section or paragraph.<sup>55</sup>

Where the ordinance is precise, definite and certain in its terms bad form will not invalidate it. While the law concerns itself more with substance than mere form, yet clear manner of expression and proper arrangement of the parts of the ordinance are the best and frequently the only guides in ascertaining the legislative intent.

54. *Van Alstine v. People*, 37 Mich. 523; *Watkins v. Hillerman*, 73 Hun (N. Y.) 317, 26 N. Y. S. 252.

55. (Relating to sale of intoxicating liquor.) "That whoever not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk,

or servant, directly, or indirectly, sell any intoxicating liquor in any quantity, shall be fined not less than twenty dollars, nor more than one hundred dollars for each and every offense." *Schofield v. Tampico*, 98 Ill. App. 324, 325; *Buell v. State*, 45 Ark. 336.

Every ordinance should be so drawn as to successfully pass the test of judicial scrutiny.<sup>56</sup>

§ 679. Recital of authority to enact is not required.

Unless expressly required by the charter, the ordinance need not contain a recital of the power to enact it. This will be presumed until the contrary is shown.<sup>57</sup> The established rule is thus aptly stated in an early Maryland case: "It is not essential to the validity of an ordinance, executing powers conferred by the legislature, that it should state, or indicate, the power in execution of which the ordinance was passed. If it state no particular power, as its basis, judicial courtesy requires that we should regard it as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted. If, in these respects, in accordance with both, no incongruity or injustice can result,

56. Failure to number the subdivisions of the ordinance in proper order does not affect its validity. *Los Angeles County v. Eikenberry*, 131 Cal. 461, 63 Pac. 766.

**Form of appropriation ordinances.** Itemizing specific objects and purposes. *Leadville v. Matthews*, 10 Colo. 125, 14 Pac. 112; *Sank v. Philadelphia*, 8 Phila. (Pa.) 117, 4 Brewster (Pa.) 133.

57. *Illinois*. *Delamater v. Chicago*, 158 Ill. 575, 42 N. E. 444.

*Massachusetts*. *Jones v. Boston*, 104 Mass. 461; *Com. v. Fahey*, 5 Cush. (Mass.) 408.

*Michigan*. *Hoyt v. East Saginaw*, 19 Mich. 39.

*Missouri*. *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W. 933.

*New York*. *Ogdensburgh v. Lyon*, 7 Lans. (N. Y.) 215.

*Canada*. Biggar, *Mun. Manual of Canada*, p. 334, citing *Fisher v. Tp. of Vaughan*, 10 Up. Can. Q. B. 492; *Tylee v. County of Waterloo*, 9 Up. Can. Q. B. 588, 590; *Re Cameron and Tp. of East Nissouri*, 13 Up. Can. Q. B. 190; *Re Gibson and United Counties of Huron and Bruce*, 20 Up. Can. Q. B. 11; *Re Croome and City of Brantford*, 6 Ontario Rep. 188.

There is no right of action against a city for attempting to enforce a by-law *ultra vires*. *Pocock v. Toronto*, 27 Ontario Rep. 635.

in regarding it as the offspring of both, or either of the powers.”<sup>58</sup>

Within the reason of this rule, it has been held that, the misrecital in an ordinance of the source of power by which the ordinance is passed will not invalidate it if the power to enact it existed.<sup>59</sup>

### § 680. Ordinance need not recite necessity of enactment.

Charters often provide that in certain ordinances, especially those relating to sanitary affairs, and street, sewer and other public work, the necessity of their passage be declared. The judicial view is that failure in this respect does not render the ordinance void, since its passage authorizing the act is equivalent to declaring the necessity.<sup>60</sup> Necessity “is nearly synonymous with

58. *Methodist Protestant Church v. Baltimore*, 6 Gill. (Md.) 391, 399, 48 Am. Dec. 540, per Dorsey, C. J.

59. *Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43.

Misrecital as to authority. Preamble recited that ordinance is adopted on the prayer of a majority of the property owners. Held, not material whether true or not, as power to proceed did not depend upon request of property owners, and, therefore, the matter in the preamble was not jurisdictional. *Bohle v. Stannard*, 7 Mo. App. 51.

A recital on the face of municipal bonds of a statute which does not grant the authority to issue such bonds is not fatal to the securities or material to their validity provided authority to issue such bonds is legally vested in the municipal corporation. *Beatrice v. Edminson*, 117 Fed. 427, 54 C. C. A. 601.

60. *Connecticut. Townsend v. Hoyle*, 20 Conn. 1, 3.

*Louisiana. Crowley v. Ellsworth*, 114 La. 308, 69 L. R. A. 276, 38 So. 199, 108 Am. St. Rep. 353.

*Missouri. Young v. St. Louis*, 47 Mo. 492; *Kiley v. Forsee*, 57 Mo. 390, 395; *McCormick v. Patchin*, 53 Mo. 33; *Bohle v. Stannard*, 7 Mo. App. 51; *Miller v. Anheuser*, 2 Mo. App. 167, 172.

*New York. Rector, etc. of Trinity Church v. Higgins*, 4 Robertson (N. Y.) 1, 10; *New York v. Dry Dock, etc. R. R. Co.*, 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563.

*North Carolina. Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521.

*Texas. Connor v. Paris*, 87 Tex. 32, 27 S. W. 88; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516.

“It is not necessary that all the reasons of the by-law should be given in the preamble of it.” Per Lord Mansfield in *Rex v. Harrison*, 3 Burrows 1328.

Compare *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

expediency or what is necessary for the public good. The word necessary when applied to law, or taking private property, is constantly understood and acted upon in this sense, or as contradistinguished from unnecessary or inexpedient. The statute then, by the words of the power in question, 'if they find it necessary,' says no more than what is implied by every charter of incorporation, as directory to its members: 'You shall not pass by-laws which are unnecessary.' But be this as it may, some exigency should, in the nature of things, always exist, and in legal presumption does exist, to warrant the passage of a positive law. Yet, we believe, an adjudication or recital of such exigency in the law itself was never deemed requisite to its validity, whether it was one of absolute necessity or mere expediency. A recital is sometimes deemed proper and useful in the construction of a law, but not essential to its constitutional existence. \* \* \* It is of the nature of legislative bodies to judge of the exigency upon which their laws are founded; and when they speak, their judgment is implied in the law itself."<sup>61</sup>

### § 681. One subject and title.

Following the provisions of most of the state constitutions, municipal charters sometimes provide that an ordinance shall embrace but one subject, which subject shall be clearly expressed in its title. General appropriation ordinances are usually excepted and may embrace the various subjects and the accounts for and on account of which moneys are appropriated.<sup>62</sup> In the

61. *Stuyvesant v. New York*, 7 Cow. (N. Y.) 588, 606, 607, followed in *Cronin v. People*, 82 N. Y. 318, 323.

To same effect *Martin v. Mott*, 12 Wheat. (U. S.) 19.

62. Charter of San Francisco, art. II, ch. 1, § 1; Statutes and Amendments to the Codes of Cal.

(1899), p. 245; Charter of St. Louis, art. III, § 13; Mun. Code of St. Louis (1901, McQuillin), p. 205; The Revised Code of St. Louis (1907, Woerner), p. 310.

*Colorado*. *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.



absence of such express provision the constitutional requirement in this respect does not apply to the passage of municipal ordinances, as ordinances are held not to be laws within its meaning.<sup>63</sup>

*Illinois.* Thompson v. Highland Park, 187 Ill. 265, 58 N. E. 328; Chicago T. T. Co. v. Chicago, 178 Ill. 429, 53 N. E. 361; Kinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327.

*Iowa.* Hanson v. Hunter, 86 Iowa 722, 48 N. E. 1005, 53 N. W. 84; Des Moines v. Hillis, 55 Iowa 643, 8 N. W. 638.

*Kansas.* Emporia v. Shaw, 6 Kan. App. 808, 51 Pac. 237.

*Kentucky.* Elliot v. Louisville, 101 Ky. 262, 40 S. W. 690; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546; Gocke v. Staebler & McFarland, 141 Ky. 66, 132 S. W. 167.

*Minnesota.* State v. Starkey, 49 Minn. 503, 52 N. W. 24.

*Mississippi.* Ocean Springs v. Green, 77 Miss. 472, 27 So. 743.

*Pennsylvania.* Chester v. Bullock, 187 Pa. St. 544, 41 Atl. 452.

In re South Shilsholl Place (Wash., 1910), 112 Pac. 228.

63. *California.* Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725.

*Colorado.* Scanlon v. Denver, 38 Colo. 401, 88 Pac. 156.

*Illinois.* Schofield v. Tampico, 98 Ill. App. 324; Harris v. People, 218 Ill. 439, 75 N. E. 1012, citing Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849.

*Indiana.* Baumgartner v. Hasty, 100 Ind. 575, 585, 50 Am. Rep. 830; Green v. Indianapolis, 25 Ind. 490; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097.

*Iowa.* Marion Water Co. v. Marion, 121 Iowa 306, 318, 96 N. W. 883.

*Kansas.* Topeka v. Raynor, 61 Kan. 10, 58 Pac. 557, 55 Pac. 509, 8 Kan. App. 279; Smith v. Emporia, 27 Kan. 528; Humboldt v. McCoy, 23 Kan. 249; Iola v. Sugg, 8 Kan. App. 529, 56 Pac. 541; Topeka v. Raynor, 8 Kan. App. 279, 55 Pac. 509, appeal dismissed in 60 Kan. 860, 58 Pac. 557; Holton v. Bimrod, 8 Kan. App. 265, 55 Pac. 505, appeal dismissed in 60 Kan. 860, 58 Pac. 558.

*Kentucky.* Tuggles v. Commonwealth, 30 Ky. L. Rep. 1071, 100 S. W. 235.

*Louisiana.* Callaghan v. Alexandria, 52 La. Ann. 1013, 27 So. 540.

*Michigan.* People v. Wagner, 86 Mich. 594, 24 Am. St. Rep. 141, 13 L. R. A. 286, 49 N. W. 609; People v. Hanrahan, 75 Mich. 611, 4 L. R. A. 751, 44 N. W. 1124.

*Missouri.* Tarkio v. Cook, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918; St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 936.

*New Hampshire.* Lisbon v. Clark, 18 N. H. 234.

*New Jersey.* Jersey City H. & P. St. Ry. v. Passaic, 68 N. J. L. 110, 52 Atl. 242; Delaware & A. Tel. Co. v. Camden County, 67 N.

The provision as to title and subject-matter is generally held to be mandatory.<sup>64</sup> The purpose of the provision is that neither the members of the legislative body nor the people should be misled by the title of an ordinance.<sup>65</sup> It is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united.<sup>66</sup>

J. L. 91, 531, 50 Atl. 452, 52 Atl. 482.

*Pennsylvania.* Yardley Borough, 22 Pa. Co. Ct. Rep. 179, 180; Corry v. Corry Chair Co., 18 Pa. Super. Ct. 271.

*South Carolina.* State v. Gibbes, 60 S. C. 500, 39 S. E. 1.

64. *Iowa.* Marion Water Co. v. Marion, 121 Iowa 306, 96 N. W. 883; Trout v. Minneapolis, etc. R. Co. (Iowa, 1910), 126 N. W. 799.

*Kansas.* Mo. Pac. Ry. Co. v. Wyandotte, 44 Kan. 32, 23 Pac. 950.

*Kentucky.* Silva v. Newport, 27 Ky. L. Rep. 212, 84 S. W. 741.

*Missouri.* State ex rel. v. St. Louis, 161 Mo. 371, 61 S. W. 658; Cooley's Const. Lim., §§ 82, 83.

*Contra.* Pim v. Nicholson, 6 Ohio St. 176; Lehman v. McBride, 15 Ohio St. 573; State ex rel. v. Covington, 29 Ohio St. 102.

Under the California decisions the provision that "an ordinance shall embrace but one subject which shall be expressed in its title," is merely directory. *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014.

65. Board of Water Com'rs of Clinton v. Dwight, 101 N. Y. 9, 11, 3 N. E. 782, per Danforth, J. *Bartlesville E. L. & P. Co. v. Bartles-*

*ville Interurban Ry. Co.* (Okla. 1910), 109 Pac. 228; *Beechwood Park Land Co. v. Summit*, 78 N. J. L. 182, 73 Atl. 57; *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014.

66. *Idaho.* State v. Calloway, 11 Idaho 719, 84 Pac. 27, citing *McQuillin, Mun. Ord.*, § 141; *St. Anthony v. Brandon*, 10 Idaho 205, 77 Pac. 322.

*Iowa.* Healy v. Johnson, 127 Iowa 221, 103 N. W. 92; *State v. Nebraska Telephone Co.*, 127 Iowa 194, 103 N. W. 120.

*Kentucky.* Louisville v. Wehmhoff, 116 Ky. 812, 25 Ky. L. Rep. 995, 76 S. W. 876; *Louisville v. Alvey*, 25 Ky. L. Rep. 995, 76 S. W. 876; *Louisville v. Smith*, 25 Ky. L. Rep. 995, 76 S. W. 876; *Paducah v. Ragsdale*, 28 Ky. L. Rep. 1057, 122 Ky. 425, 92 S. W. 13.

*Minnesota.* Duluth v. Abrahamson, 96 Minn. 39, 104 N. W. 682.

*Mississippi.* Winfield v. Jackson, 89 Miss. 272, 42 So. 183.

*Missouri.* St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918; *Bergman v. St. Louis Iron Mountain & Southern R. R. Co.*, 88 Mo. 678, 683; *Senn v. Southern Ry. Co.*, 124 Mo. 621, 28 S. W. 66; *Weber v. Johnson*, 37 Mo. App. 601; *Fairmont v. Meyer*,

Similar prohibitions contained in state constitutions are given like construction.<sup>67</sup> The provision being restrict-

83 Minn. 456, 86 N. W. 457; *St. Louis v. Green*, 7 Mo. App. 468.

*Ohio*. *Willsville v. O'Connor*, 24 Ohio Circ. Ct. Rep. 689; *Belle v. Glenville*, 27 Ohio Cir. Ct. Rep. 181; *Hefner v. Toledo*, 75 Ohio St. 413, 80 N. E. 8.

*Pennsylvania*. *Commonwealth v. Larkin*, 27 Pa. Super. Ct. 397.

**One subject and title.** The ordinance prohibited engaging in any business, or keeping open any place of business, or allowing persons to resort thereto for the purpose of drinking intoxicating liquors on Sunday, and the title "An ordinance concerning misdemeanors" was held sufficient. *Lovilia v. Cobb*, 126 Iowa 557, 102 N. W. 496.

Thus under a provision that no ordinance shall contain more than one subject, which shall be clearly expressed in its title, the fact that an ordinance imposing a license on hucksters incidentally operates to provide revenue does not render the ordinance obnoxious to the fundamental rule. *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549.

67. *Florida*. *State v. Duval County*, 23 Fla. 483, 3 So. 193.

*Georgia*. *Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Burns v. State*, 104 Ga. 544, 30 S. E. 815, distinguishing *Sasser v. State*, 99 Ga. 54, 25 S. E. 619; *Butner v. Boifeuillet*, 100 Ga. 743, 28 S. E. 464; *Ayeridge v. Comrs.*, 60 Ga. 404; *Brieswick v. Brunswick*, 51 Ga. 639.

*Illinois*. *McGurn v. Board of Education*, 133 Ill. 122, 24 N. E. 2 McQ.—37

529; *Ottawa v. People ex rel.* 48 Ill. 233; *People ex rel. v. Mellen*, 32 Ill. 181.

*Iowa*. *Williamson v. Keokuk*, 44 Iowa 88; *Whiting v. Mt. Pleasant*, 11 Iowa 482; *Ex parte Pritz*, 9 Iowa 30; *Morford v. Unger*, 8 Iowa 82.

*Missouri*. *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. v. Mead*, 71 Mo. 266; *State ex rel. v. County Court*, 102 Mo. 531, 15 S. W. 79; *State ex rel. v. Mathews*, 44 Mo. 523; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State ex rel. v. Finn*, 8 Mo. App. 341.

*New Jersey*. *Curry v. Elvins Co.*, 32 N. J. L. 362, 363, per *Dalrimple, J.*

*Washington*. *State ex rel. v. New Whatcom*, 3 Wash. 7, 10, 27 Pac. 1020.

*Wisconsin*. *Thompson v. Milwaukee*, 69 Wis. 492, 34 N. W. 402.

**Sufficiency of title.** The title of an act is sufficient if it does not mislead as to the chief topic of the act, and that the minor features of it have a reasonable and natural connection with the subject named in the title. *State ex rel. v. County Court*, 128 Mo. 427, 441, 30 S. W. 103, 31 S. W. 23; *State ex rel. v. Miller*, 100 Mo. 439, 13 S. W. 677; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Ewing v. Hoblitzelle*, 85 Mo. 64; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. Miller*, 45 Mo. 495; *State ex rel. v. Mead*, 71 Mo. 266; *Hannibal v. Marion Co.*, 69 Mo. 571; *State ex rel. v. Heege*, 135 Mo. 112, 36 S. W. 614.

ive, a liberal construction is adopted. If the title shows the general character of the ordinance and thus prevents its enactment being inadvisedly or fraudulently accomplished, it will be sufficient.<sup>68</sup>

Matters of detail need not be specified. The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed.<sup>69</sup> "An abstract of the law is not required in the title;"<sup>70</sup> nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached.<sup>71</sup> So it is not required that every other law repealed by implication because of repugnancy or inconsistency shall be mentioned in the title of the new law.<sup>72</sup>

The fact that an ordinance violates the charter in that it contains a provision upon a foreign subject, disconnected from that expressed in the title, has been held not to invalidate the rest of the ordinance, properly embraced in the title.<sup>73</sup>

68. *State v. Cantieny*, 34 Minn. 1, 6, 7, 24 N. W. 458.

69. *Alabama*. Lockhart v. Troy, 48 Ala. 579, 584.

*Illinois*. People ex rel. v. Mel-  
len, 32 Ill. 181.

*Missouri*. Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

*Pennsylvania*. Com. v. LaBar, 5 Lack. L. N. (Pa.) 229, 7 Northampton County Rep. 785.

*Wisconsin*. Compare Thompson v. Milwaukee, 69 Wis. 492, 34 N. W. 402.

While the title need not be an index of the contents of the ordinance, it ought not to be misleading, and if it fairly gives notice of the subjects so as to reasonably lead to inquiry into its body, it is

sufficient. *Commonwealth v. LaBar*, 7 North (Pa.) C. C. R. 85.

70. *Brewster v. Syracuse*, 19 N. Y. 116, 117, per Johnson, C. J.

71. *Board of Water Comrs. of Clinton v. Dwight*, 101 N. Y. 9, 12, 3 N. E. 782; *People ex rel. v. Lawrence*, 41 N. Y. 137, 139; *Gordon v. Cornes*, 47 N. Y. 608, 615, per Rapallo, J.; *Barton v. Pittsburg*, 4 Brews. (Pa.) 373; *Appeal of Esling*, 89 Pa. St. 205.

"An act for the relief of J. L.," need not state that the money is to be raised by taxation. *Brewster v. Syracuse*, 19 N. Y. 116.

72. *State v. Gallagher*, 42 Minn. 449, 44 N. W. 529.

73. *Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235.

The charter of San Francisco provides that, "if any subject be embraced in an ordinance and not

Special statutes will sometimes suspend charter restrictions relating to the title of ordinances. Thus where a special statute authorized the council to submit to the voters a plan, by ordinance, for the construction of water, light and sewerage systems, "either or both," it was held that under such statute an ordinance on these subjects might be either single, double or triple.<sup>74</sup>

### § 682. Same—illustrative cases.

Where the title, authorizing the repairing of a street, declares that the paving shall be done with asphalt, while the body of the ordinance contains a proviso permitting the use of vitrified brick in lieu of asphalt in the gutters and such other portions of the street as, in the judgment of the city engineer, shall be necessary or desirable, the ordinance is valid.<sup>75</sup>

An ordinance which provided for the grading and paving of an alley was held valid against the objection that it contained two subjects in violation of the charter provisions.<sup>76</sup>

An ordinance, authorizing the "purchase or construction" of water works, is not void on account of covering two subjects, nor because it is in the alternative.<sup>77</sup> So an ordinance controlling the keeping of certain animals, and also their use in public places, is not void as relating to more than one subject.<sup>78</sup>

expressed in its title, such ordinance shall be void only as to so much thereof as is not expressed in its title." Charter of San Francisco, art. II, ch. 1, § 12; Stat. and Amend. to Code of Cal. (1899), p. 245.

74. *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014.

The title of an ordinance reciting that its object was to "grant certain rights and privileges to a certain telephone company" has been held sufficient to carry a

grant of a right to use the streets and alleys of the city for such purpose. *State v. Nebraska Telephone Co.*, 127 Ia. 194, 103 N. W. 120.

75. *Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165.

76. *Weber v. Johnson*, 37 Mo. App. 601.

77. *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

78. *Bayard v. Baker*, 76 Iowa 220, 40 N. W. 318.

An ordinance which in the first section vacates an alley and in the second, grants the land over which it passed is valid, for both provisions relate to the same general subject, which is the grant.<sup>79</sup>

Where the ordinance is in the nature of a grant, that which is incident thereto may be embraced. Thus where an ordinance grants the right to transmit electric light and power, the further grant therein of a privilege to conduct to the electric light plant water from a particular source is an incident to the object of supplying electricity.<sup>80</sup>

Under the title "To prevent the establishment of tippling houses," an ordinance which prohibited any sale of lager beer, ale or other malt liquor, without a license, was sustained, the court remarking: "The title is unnecessary, and cannot control the tenor of the enactment."<sup>81</sup>

"An ordinance to regulate and prohibit the running at large of animals" is sufficient to embrace a clause forbidding any person from breaking open the inclosure established as a pound, and unlawfully taking and driving therefrom animals impounded therein.<sup>82</sup>

An ordinance authorizing submission to the electors of the question of increasing the city's indebtedness for several specified purposes was held not to violate a statute prohibiting the enactment of ordinances containing a plurality of subjects not expressed in the title.<sup>83</sup>

### § 683. Same subject.

An ordinance entitled, "An ordinance relative to misdemeanors, breaches of the peace, and disorderly conduct," imposing a penalty or fine and imprisonment

79. *Dempsey v. Burlington*, 66 Iowa 687, 24 N. W. 508.

80. *Hanson v. William A. Hunter Electric Light Co.*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

81. *State ex rel. v. Beverly*, 45 N. J. L. 288, 291.

82. *Smith v. Emporia*, 27 Kan. 528, 530.

83. *Chostkov et al. v. Pittsburg*, 177 Fed. 936.

upon "any person who shall make any noise, riot, disturbance or improper diversion," and on persons found in a state of notorious drunkenness in any street or public place in the city, and persons guilty of other offenses described, is valid.<sup>84</sup>

"An ordinance defining and prescribing punishment for certain offenses," and which in the body thereof defines and prescribes the punishment for twenty-six different offenses, was held valid.<sup>85</sup>

An ordinance to regulate the speed of trains may embrace provisions relating to the equipment of trains.<sup>86</sup>

An ordinance with the title "Public carriers," may properly regulate street railway cars.<sup>87</sup>

An ordinance entitled, "An ordinance regulating and keeping, storing and handling and licensing the removal of garbage, grease, offal and other refuse matter composed of either animal or vegetable matter," and to repeal a prior ordinance on the same subject, and prescribing penalties for the violation thereof, and fixing a license tax on vehicles used for the removal of garbage, is valid.<sup>88</sup>

"An act for the relief of the village of Clinton" is a good title.<sup>89</sup>

84. *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458.

85. "The subject of the ordinance is *offenses* against the city. The subject is composed of many parts." *State v. Wells*, 46 Iowa 662, 663, per Beck, J.

Ordinance regulating several trades and occupations, under general title, held good. *Seattle v. Barto*, 31 Wash. 145, 71 Pac. 735.

"An ordinance to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for said excepted purposes," held valid. In

re *Thomas*, 53 Kan. 659, 37 Pac. 171.

"An ordinance to regulate bicycles," covering use of, on streets, is sufficient. *Des Moines v. Keller*, 116 Iowa 648, 88 N. W. 827.

86. *Bergman v. St. L. I. M. & S. Ry. Co.*, 88 Mo. 678, 1 S. W. 384.

87. *Senn v. So. Ry. Co.*, 124 Mo. 621, 28 S. W. 66.

88. *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045.

89. "It must be conceded that the words of the title are very general, but they are comprehensive and do express a single intent which the body of the act neither

"An ordinance for the issuance of waterworks," was held a sufficient title to an ordinance authorizing the issuance of water works bonds, since the words employed suggested the word omitted.<sup>90</sup>

An ordinance amending sections relating to officers, their salaries and bonds, under the title "An ordinance to amend sec. —, ch. —, of the city ordinance," was held good, as the subjects are naturally connected.<sup>91</sup>

The following titles have been held sufficient: "Ordinance No. —, in relation to the sale of intoxicating liquor."<sup>92</sup>

"An ordinance relating to the railroad encroachments and obstructions in B. Avenue."<sup>93</sup>

"An ordinance directing the removal of telephone and telegraph poles placed in the sidewalks, streets, highways and public places in the township of Pensauken, without the consent of the public authorities."<sup>94</sup>

exceeds nor contradicts. It has been held that the purpose of the provision was that neither the members of the legislature nor the public should be misled by the title of an act, and thereby various objects, having no necessary or natural connection with each other, be united in one bill. There is here neither that danger nor that result." Board of Water Com'rs of Clinton v. Dwight, 101 N. Y. 9, 11, 3 N. E. 782, per Danforth, J.

90. Knight v. West Union, 45 W. Va. 194, 32 S. E. 163.

A contract contained in an ordinance provided for a specified number of hydrants at a fixed annual rental, held void because not clearly expressed in the title. Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349.

An ordinance entitled, "An

ordinance prohibiting the dispensing of spirituous liquors during certain hours, closing saloons, coffee houses, and like places of business during such period and requiring the removal of obstructions to the interior view from saloons, coffee houses or like places of business," was held valid. McNulty v. Toopf, 116 Ky. 202, 25 Ky. L. Rep. 430, 75 S. W. 258.

91. Lowry v. Lexington, 113 Ky. 763, 24 Ky. L. Rep. 516, 68 S. W. 1109.

92. Schofield v. Tampico, 98 Ill. App. 324, 325.

93. Cape May v. Cape May, Del. Bay & S. P. R. R. Co., 60 N. J. L. 224, 225, 37 Atl. 892, 39 L. R. A. 609.

94. Delaware & Atl. Tel. & Tel. Co. v. Pensauken Tp., 67 N. J. L. 531, 532, 52 Atl. 482.



“An ordinance providing for the licensing of telegraph, telephone and electric light poles and wires and collecting of an annual tax therefor.”<sup>95</sup>

“An ordinance to regulate certain trades and occupations in the City of S., providing penalties for the violation thereof, and repealing all ordinances inconsistent therewith.”<sup>96</sup>

§ 684. Same—the provision of the ordinance must not be inconsistent with the title.

Thus the title “Regulating the use and sale of intoxicating liquors,” is insufficient where the substance of the ordinance is entirely prohibitory, with “no pretense at regulation.” The charter required the subject to be clearly expressed in the title.<sup>97</sup> So where the title and body of the ordinance embraces two distinct subjects, namely, (1) extending the limits of the city, and (2) making an appropriation to build a bridge, the ordinance is void, notwithstanding the provision relating to the appropriation was null because of lack of power in the council to make it.<sup>98</sup> So an ordinance, the title of which is to prohibit animals from running at large, which, in addition, provides that no person shall keep a dog without paying a tax, and directing the city marshal to kill all

95. *Newcastle v. Electric Light Co.*, 16 Pa. Co. Ct. Rep. 663.

96. *Seattle v. Barto*, 31 Wash. 145, 71 Pac. 735.

**Validity of titles in particular cases.** *El Dorado v. Beardsley*, 53 Kan. 363, 36 Pac. 746; *Fairmont v. Meyer*, 83 Minn. 456, 86 N. W. 457; *State ex rel. v. St. Louis*, 169 Mo. 31, 68 S. W. 900.

97. **Ordinance inconsistent with title.** “Instead of the title of this ordinance being a clear statement of its subject, it is wholly inconsistent with it, and states a wholly different subject as dif-

ferent as regulation is from prohibition. We cannot disregard this provision of the law. It is not unreasonable that when a village assumes to itself the functions of a municipal corporation it should be held to a reasonable compliance with the laws of the state in the enactment of its ordinances, and to that end employ legal counsel if necessary.” *Cantril v. Sainer*, 59 Iowa 26, 12 N. W. 753.

98. *Mo. Pa. Ry. v. Wyandotte*, 44 Kan. 32, 23 Pac. 950.

dogs running at large whose owners have not complied with the regulation, and rendering such owners liable to criminal prosecution, contains more than one subject and is void.<sup>99</sup>

### § 685. Title in revision of ordinances.

Charters often require a revision of the general ordinances at stated intervals. This is generally done by ordinance.<sup>1</sup> The ordinance in revision may embrace all of the existing ordinance provisions, classified according to titles, chapters, articles and sections, and be passed as one ordinance, under the general title "An ordinance in revision of the general ordinance of the City of — (or Town of —)." Sometimes, in addition, words are included in the title, as "to provide new ordinance provisions for the government of said city." It seems clear that under a charter requiring the title to clearly express the subject-matter of the ordinance, such words would be insufficient to authorize the enactment of new ordinance provisions, but their incorporation would not invalidate the title; they may be treated as surplusage.

It has been held in Maryland that, in the absence of statutory prohibition, it is entirely competent for the municipal legislature by a single ordinance to declare any compilation of ordinances or proposed ordinances to be in force. The court remarked: "Such a power has been too generally exercised, with implied if not express recognition by the courts, to be now questioned."<sup>2</sup>

99. *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. 745.

1. Charter of St. Louis, art. III, § 29; The Mun. Code of St. Louis (1901, McQuillin), 294; The Revised Code of St. Louis (1907, Woerner), p. 340.

2. *Garrett v. Janes*, 65 Md. 260, 265, 3 Atl. 597.

**Time of revision.** Under a charter providing that the ordinances should be revised within

one year from the time the charter took effect, it was held that a revision made after the expiration of the time was valid. *Lowrey v. Lexington*, 24 Ky. L. Rep. 516, 68 S. W. 1109.

Statute requiring a publication of a digest of ordinances every five years, held directory. *Whalen v. Macomb*, 76 Ill. 49, 51.

The statute of Nebraska applicable to cities of the first class,

## § 686. Preamble.

While, as we have seen, it is unnecessary that the ordinance should contain a recital of the authority<sup>3</sup> or the necessity for its passage,<sup>4</sup> a preamble is sometimes adopted declaring the reasons and purposes of the ordinance.<sup>5</sup> The stately preamble beginning with the emphatic "whereas" was the style of the early-day legislation; but as it is not required it is less frequently employed at the present time, especially in municipal corporation legislation.<sup>6</sup>

between five thousand and twenty-five thousand inhabitants, confers power on such cities "To revise the ordinances of the city from time to time, and publish the same in book or pamphlet form. Such revision shall be by one ordinance, embracing all ordinances preserved as changed or added to and perfected by revision, and shall embrace all the ordinances of every nature preserved, and be a repeal of all ordinances in conflict with such revision, but all ordinances then, in force shall continue in force after such revision for the purpose of all rights acquired, fines, penalties, forfeitures, and liabilities incurred, and actions therefor. The only title necessary for such revision and repeal shall be "An ordinance to revise all the ordinances of the city of ———," and sections and chapters may be used instead of numbers, and original titles need not be preserved, nor signature of the mayor." *Laws of Neb.* 1903, pp. 240, 241.

3. § 679 *ante*.

4. § 680 *ante*.

5. *Com. v. Turner*, 1 Cush. (Mass.) 493; *Barter v. Com.*, 3 Pa. (Penrose & Watts) 253; *Plymouth v. Pettijohn*, 4 Devereux (N. C.) 591; *Summerville v. Pressley*, 33 S. C. 56, 59, 26 Am. St. Rep. 659; *Charleston v. Elford*, 1 McMullan (S. C.) 234; *State (Delaware & Atl. Tel. & T. Co.) v. Pensauken Tp.*, 67 N. J. L. 91, 531, 50 Atl. 452, 52 Atl. 482; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516.

6. Preamble of ordinance forbidding smoking in street cars: "Whereas, The custom of permitting smoking in street cars of this city is a most vile and objectionable one to a majority of our citizens, especially to the ladies, who are entitled to that courtesy and consideration due to their sex; and Whereas, This alone of all the cities in the Union allow such a discomfort to those of their citizens who ride in the public cars." The ordinance was sustained under general powers. *State v. Heidenhain*, 42 La. Ann. 483, 484, 485, 21 Am. St. Rep. 388.

### § 687. Ordaining or enacting clause.

In the absence of a preamble, the title is followed by the ordaining or enacting clause. The form is usually prescribed in the charter. The style varies in different charters.<sup>7</sup>

Charter provisions prescribing the style of ordinances are generally held to be directory; hence failure to observe the charter form,<sup>8</sup> or even omission of the ordaining or enacting clause, although expressly required, does

7. *Greater New York*. "Be it ordained by the Municipal Assembly of The City of New York, as follows." Charter, City of New York, ch. 1, § 38; Laws of N. Y. (1897), p. 14.

*Chicago*. "Be it ordained by the City Council of Chicago." 1 Starr & Curtis Ill. Stat., p. 717, par. 64.

*Philadelphia*. "The Select and Common Councils of the City of Philadelphia do ordain." Philadelphia v. Brabender, 201 Pa. St. 574-5, 51 Atl. 374.

*St. Louis*. "Be it ordained by the Municipal Assembly of the City of St. Louis, as follows." Charter, art. III, § 12; Mun. Code of St. Louis (1901), p. 205; The Revised Code of St. Louis (1907, Woerner), p. 310.

*San Francisco*. "Be it ordained by the people of the City and County of San Francisco, as follows." Charter, art. II., ch. 1, § 8; Statutes and Amendments to Codes of Cal. 1899, p. 245.

*New Orleans*. "Be it ordained by the City Council of the City of New Orleans." State v. McNally, 48 La. Ann. 1450.

*Detroit*. "It is hereby ordained by the people of the City of De-

troit." People v. Keir, 78 Mich. 98, 100, 43 N. W. 1039.

Ordaining clause illustrated. "Be it ordained by the City Council of the City of Tampa." Tampa v. Salomonson, 35 Fla. 446, 467, 17 So. 581.

"Be it ordained by the Mayor and City Council of Monroe." Vicksburg, etc. R. R. Co. v. Monroe, 48 La. Ann. 1102, 1105, 20 So. 664.

"Be it ordained by the President and board of trustees of the Village of ————" Schofield v. Tampico, 98 Ill. App. 324, 325.

"Be it ordained by the township committee of the township of Pensauken." Delaware & Atlantic Teleg. & Teleph. Co. v. Pensauken Tp. Committee, 67 N. J. L. 531, 50 Atl. 452, 52 Atl. 482.

An enacting clause which follows the statute is sufficient. Ex parte Keeling, 54 Tex. Cr. Rep. 118, 130 Am. St. Rep. 884, 121 S. W. 605.

8. Napa v. Easterby, 76 Cal. 222, 228, 18 Pac. 253; People v. Chipman, 31 Colo. 90, 71 Pac. 1108; Best v. Broadhead, 18 Idaho 11, 16, 108 Pac. 333; State v. Fountain, 14 Wash. 236, 44 Pac. 270.

not invalidate the ordinance, in the absence of provision of the charter to that effect.<sup>9</sup>

In like manner as respects the title, as we have seen,<sup>10</sup> a constitutional provision relating to the enacting clause of acts of the legislature, in the absence of express provision, has no application to municipal ordinances.<sup>11</sup>

A variance in stating the legal name of the corporation in a by-law is not material if it appears on the face of the by-law to be enacted by the corporation having power to pass it.<sup>12</sup> So an immaterial variance from the prescribed form in the ordaining clause will not render the ordinance void, as where the words "common council" instead of "city council" are employed;<sup>13</sup> or "the mayor and common council" instead of, "the common council of the city."<sup>14</sup>

9. *St. Louis v. Foster*, 52 Mo. 513; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *Ryan v. Lynch*, 68 Ill. 160; *Chicago, etc. R. R. Co. v. Hines*, 82 Ill. App. 488, affirmed in 183 Ill. 483, 56 N. E. 177; *Ramsey County v. Heenan*, 2 Minn. 330.

**Omission of ordaining clause.** *People ex rel. v. Lee*, 112 Ill. at p. 121, contains a *dictum* to the effect that omission of the ordaining clause of the ordinance may not be important.

A like ruling has been made respecting the enacting clause of a legislative act provided for by the constitution. *Cape Girardeau v. Riley*, 52 Mo. 424, 14 Am. Rep. 427. *Contra*, *Galveston, H. & S. A. Ry. v. Harris* (Tex. Civ. App., 1896), 36 S. W. 776.

10. § 141 *supra*.

11. *Tarkio v. Cook*, 120 Mo. 1, 7, 41 Am. St. Rep. 678, 25 S. W. 202.

12. *In re Hawkins v. Municipal Council, etc. of Huron et al.*, 2

*Up. Can. C. P.*, 72, 83, 84, rule as to misnomer in deed and conveyances applied.

13. *Law v. People ex rel.*, 87 Ill. 385, 403.

14. *State v. Nohl*, 113 Wis. 15, 88 N. W. 1004.

**Sufficiency of enacting clause.** Under a charter prescribing the enacting clause, as follows: "Be it ordained by the council of the Town of \* \* \*," an ordinance is valid where the ordaining clause recites, "Be it ordained by the town council." *State v. Fountain*, 14 Wash. 236, 44 Pac. 270.

A borough ordinance was held invalid which recited that the ordinance as enacted by the chief burgess and town council, when the corporate name was the chief burgess, assistant burgess and town council. *Milton Borough v. Hoagland*, 3 Pa. Co. Ct. Rep. 283.

As to corporate name in particular case, where there was a

## § 688. Time of introduction and passage.

Charter requirements that ordinances shall be introduced at a meeting prior to their passage are generally held mandatory.<sup>65</sup> A charter provision reciting that, "no ordinance and no resolution granting any franchise for any purpose shall be passed \* \* \* on the day of its introduction, nor within five days thereafter, nor at any other time than at a regular meeting, nor without being first submitted to the city attorney," has been held not to apply to ordinances other than those granting franchises.<sup>66</sup>

change in class. *West v. Columbus*, 20 Kan. 633, 635.

Enacting clause read: "Be it ordained by the City of Carlinville" instead of "Be it ordained by the city council of the City of Carlinville," as the charter provided. Held, the charter provision was merely directory and the ordinance was not void. *People v. Burke*, 206 Ill. 358, 69 N. E. 45.

Under a statute prescribing that the style of ordinances shall be "Be it ordained by the board of trustees," etc. an ordinance with the enacting clause "Be it ordained by the town council of the Town of Sterling," held sufficient. *People v. Chipman*, 31 Colo. 90, 71 Pac. 1108.

65. *Kentucky*. *Oswald v. Gosnell*, 21 Ky. L. Rep. 1660, 56 S. W. 165; *East Tennessee Tel. Co. v. Anderson Co. Tel. Co.*, 22 Ky. L. Rep. 418, 57 S. W. 457.

*Louisiana*. *New Orleans v. Brooks*, 36 La. Ann. 641.

*New Jersey*. *State (Delaware & A. Tel. Co.) v. Pensauken Tp.*, 67 N. J. L. 91, 531, 50 Atl.

452, 52 Atl. 482; *State v. Bergen*, 33 N. J. L. 39; *State v. Jersey City*, 34 N. J. L. 429.

*Virginia*. *Danville v. Shelton*, 76 Va. 325.

*Wisconsin*. *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

An ordinance will not be held invalid because adopted at a meeting at which the same was presented and because it was not submitted to an ordinance committee or read at three separate meetings, when the law does not so require. *Wade v. Nunnally*, 19 Tex. Civ. App. 256, 46 S. W. 668.

An ordinance may be enacted on the day introduced, if the charter does not forbid. *Fourth Street*, 19 Pa. Co. Ct. Rep. 488.

66. "Many good and sufficient reasons might be given for imposing legislative restrictions upon city authorities in the granting of franchises that would not be applicable to their control of the ordinary affairs committed to their discretion." *Raborn v. Mish*, 12 Wash. 167, 169, 40 Pac.

Under such provision a substituted ordinance which is, in effect, an amendment of the original ordinance, and which is clearly within the limits of the subject-matter of the original proposition, may be passed although five days did not elapse between its introduction and its passage.<sup>67</sup>

An ordinance which cannot be passed at the same meeting at which it is introduced cannot be passed at an adjourned meeting thereof.<sup>68</sup> In one case an ordinance was taken up and laid over for thirty days, but on such thirtieth day there was no meeting of the council. It was held that the ordinance died on such day, and was not rendered valid by being taken up, read a third time and passed.<sup>69</sup>

A charter provision that, "no error in the proceedings of the general council shall exempt from payment after the work is done, as required by ordinance or contract," has been held curative, and therefore failure to vote upon the ordinance under which a public improvement was made, on two different days as required by charter, does not invalidate it.<sup>70</sup>

731, overruling *dictum* in *Vancouver v. Wintler*, 8 Wash. 378, 380, 36 Pac. 278, 685.

"No bill for the grant of any franchise shall be put upon its final passage within ninety days after its introduction, and no franchise shall be renewed before one year prior to its expiration." Charter San Francisco, art. II., ch. 1, § 12; Stat. & Amend. to Codes of Cal. (1899), 245.

67. *Vancouver v. Wintler*, 8 Wash. 378, 380, 36 Pac. 278, 685.

68. *State v. Washington*, 44 N. J. L. 605, 43 Am. Rep. 402; *Flood v. Atlantic City*, 63 N. J. L. 530, 42 Atl. 829.

69. *Jersey City H. & P. St.*

*Ry. Co. v. Passaic*, 68 N. J. L. 110, 52 Atl. 242.

70. *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 508, 515.

When provision as to time of introduction and vote on passage not applicable. *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900; *Mackin v. Wilson*, 20 Ky. L. Rep. 218, 45 S. W. 663; *Roberts v. Paducah*, 95 Fed. 62.

Sometimes by rule of council ordinances are required after being presented and read to lie over one week before final action. *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57.

Where a charter provides that meetings of the mayor and aldermen shall be held at certain times of the year therein stated, and makes no provision for special meetings, an ordinance passed at a meeting held at a time other than that mentioned in the charter is void.<sup>71</sup>

§ 689. Same—double board.

In a legislative municipal assembly, composed of two branches, a charter provision that, "no bill shall be passed finally in either branch upon the same day on which it was introduced or reported," prohibits the passage by one branch of an ordinance on the same day that it is reported to it by the other branch.<sup>72</sup> So where the legislative department is composed of two boards, an ordinance passed by one board at one session, but not passed by the other until the next session, is not duly passed and is void.<sup>73</sup> So in another case of a double legislative board, the express charter requirement that an ordinance which had passed one board should be published before being sent to the other, and which forbade an ordinance which had passed one board from being acted on by the other on the same day, except by unanimous consent, was held mandatory.<sup>74</sup>

Mere failure to observe a provision of the joint rules and orders of a council composed of two boards, as one directing that an ordinance shall first be passed in the common council, does not invalidate the ordinance, pro-

71. *Glasgow v. Morrison-Fuller*, 142 Mo. App. 303, 126 S. W. 236.

72. *Altoona v. Bowman*, 171 Pa. St. 307, 33 Atl. 187; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Oswald v. Gosnell*, 21 Ky. L. Rep. 1660, 56 S. W. 165; *Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447; *Gleason v. Barnett*, 20 Ky. L. Rep. 1865, 49 S. W. 1060.

See *Lewis v. New York*, 35 How. Pr. (N. Y.) 162.

73. *In re Beekman*, 11 Abb. Pr. (N. Y.) 164, 19 How. Pr. 518; *Wetmore v. Story*, 22 Barb. (N. Y.) 414, 3 Abb. (N. Y.) 262.

74. *Herzo v. San Francisco*, 53 Cal. 134.



vided it is shown that the charter has been complied with in its passage.<sup>75</sup>

### § 690. Reference to and report by committee.

Charter requirements that an ordinance shall not be considered for final passage unless the same has been referred to and reported upon by a committee are generally held mandatory. Ordinances authorizing the disbursements of money are, under some charters, required to be referred to certain fiscal officers, as the comptroller, and be endorsed to the effect that sufficient unappropriated means stands to the credit of the fund therein named to meet the requirements of the ordinance; and unless this is done it is unlawful to recommend its passage or pass it.<sup>76</sup> Failure to observe a charter provision requiring all contracts for street improvements to be referred to a committee of the council, who should report thereon, has been held to invalidate the contract and not binding on the lot owners.<sup>77</sup> "The manifest object was to prevent improvident legislation; to create a circumspect body that would stand between the street contractor and the city treasury, between the lot owner and the tax collector, between the citizen and the almost absolute power of the city council, and see that no wrong was committed."<sup>78</sup>

75. *Chandler v. Lawrence*, 123 Mass. 213.

Where the charter has been violated as to time of passage, defect may be cured by reconsideration. *Specht v. Louisville*, 22 Ky. L. Rep. 699, 58 S. W. 607; *Oswald v. Gosnell*, 21 Ky. L. Rep. 1660, 56 S. W. 165.

76. Charter of St. Louis, art. III, § 13, Mun. Code of St. Louis (1901, McQuillin), p. 205; Charter of St. Louis, art. V, § 12; Mun. Code of St. Louis (1901, McQuil-

lin), 247; The Revised Code of St. Louis (1907, Woerner), pp. 310, 370.

77. *Covington v. Woods*, 3 Ky. L. Rep. 85; *Murphy v. Louisville*, 9 Bush. (Ky.) 189.

Failure to refer ordinance to committee will not invalidate it unless law so requires. *Wade v. Nunelly*, 19 Tex. Civ. App. 256, 46 S. W. 668.

78. Per Holt, J., in *Worthington v. Covington*, 6 Ky. L. Rep. 237.

In a Wisconsin case, the subject-matter of the resolution was the laying of permanent water mains. The charter provided that ordinances and resolutions "appropriating money or creating any charge against any fund of the city shall be referred to appropriate committees, and shall only be acted on by the council at a subsequent meeting not held on the same day, on the report of the committee to which the same was referred." In direct violation of it, the matter embraced in the resolution was never referred to any committee by the council, and was acted upon not only on the same day on which it was first presented, but also at the same meeting of the council. The resolution was held void, the court saying that "the requisite steps and delay were doubtless to afford notice to all the members of the council and the public. This action is expressly prohibitory."<sup>79</sup>

#### § 691. Signing and approval of ordinance by mayor.

Where the mayor is a constituent part of the legislative power, his concurrence is essential to complete any given legislative act. This is as necessary to its validity as its passage by the council or governing body, unless it should be passed over his veto in accordance with the law governing the corporation.<sup>80</sup> His consent is usually evidenced by his signature to the bill or ordi-

79. *Gilman v. Milwaukee*, 61 Wis. 538, 21 N. W. 640.

80. *Iowa*. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

*Louisiana*. *Breaux's Bridge v. Dupuis*, 30 La. Ann. (pt. 2), 1105.

*Missouri*. *State v. Butler*, 178 Mo. 272, 77 S. W. 560; *Mulligan v. Lexington*, 126 Mo. App. 715, 105 S. W. 104.

*New Jersey*. *Sturr v. Elmer*, 75 N. J. L. 443, 67 Atl. 1059.

*New York*. *People v. Schroeder*, 76 N. Y. 160.

*Pennsylvania*. *Waln v. Philadelphia*, 99 Pa. St. 330.

Injunction to restrain. *New Orleans E. R. Co. v. New Orleans*, 39 La. Ann. 127, 1 So. 434; *Dailey v. New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945.

nance.<sup>81</sup> The affixing of the mayor's name by a third person, in the presence, and under the direction, of the mayor, has been held to be a sufficient approval.<sup>82</sup>

Whether the mayor's signature is indispensable to the validity of an ordinance or other corporate act will depend upon the language of the particular charter and its construction as compared with other provisions.<sup>83</sup> Under some charters it is held that without the mayor's signature the legislative act, whether in the form of an ordinance or a resolution, is void.<sup>84</sup> But unless this is

81. *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8; *Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643; *Irvin v. Devors*, 65 Mo. 625; *Thomson v. Boonville*, 61 Mo. 282; *Saxton v. St. Joseph*, 60 Mo. 153; *Saxton v. Beach*, 50 Mo. 488.

82. *Porter v. R. J. Boyd Const. Co.*, 214 Mo. 1, 112 S. W. 235.

83. *California*. *Clarke v. Jennings* (Cal., 1893), 32 Pac. 1049; *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. 909; *Taylor v. Palmer*, 31 Cal. 241; *Creighton v. Manson*, 27 Cal. 613.

*Iowa*. *Altman v. Dubuque*, 111 Iowa 105, 82 N. W. 461.

*Maine*. *Preble v. Portland*, 45 Me. 241.

*Massachusetts*. *Hibbard v. Suffolk County*, 163 Mass. 34, 39 N. E. 285.

*Michigan*. *Baar v. Kirby*, 118 Mich. 392, 76 N. W. 754; *Chaffee v. Granger*, 6 Mich. 51.

*Minnesota*. *State v. Armstrong*, 54 Minn. 457, 56 N. W. 97; *State v. District Court*, 41 Minn. 518, 43 N. W. 389.

*New Jersey*. *McDermott v. Kenny*, 45 N. J. L. 251.

*New York*. *People v. Amsterdam*, 90 Hun (N. Y.) 488.

*Oregon*. *Ladd v. East Portland*, 18 Ore. 87, 22 Pac. 533.

Where a contract out of which a claim arose, was made prior to the passage of an act requiring the mayor's approval, it was held that "the plaintiff has no such vested right under his contract, which forbids the application of the act, subsequently passed requiring the mayor's approval." *Walcutt v. Columbus*, 27 Ohio Cir. Ct. Rep. 238, 17 Ohio Cir. Ct. Dec. 238.

84. *Mayor's signature required.*

*California*. *Pollok v. San Diego*, 118 Cal. 593, 50 Pac. 769; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 191.

*Colorado*. *Central v. Sears*, 2 Colo. 588.

*Florida*. *Pensacola v. Southern Bell Telephone Co.*, 49 Fla. 161, 37 So. 820.

*Illinois*. 1 *Starr & Curtis Ill. Stat.*, p. 686, par. 47; *Golden v. Toluca*, 108 Ill. App. 467.

*Iowa*. *Altman v. Dubuque*, 111 Iowa 105, 82 N. W. 461; *Stutsman v. McVicar*, 111 Iowa 40, 82 N. W. 460; *Chicago, etc. R. R. Co. v. Council Bluffs*, 109 Iowa 425,

made an express requirement, as where the charter either expressly or by implication declares that the act will have no validity in the absence of such signature, many cases hold that it may be dispensed with.<sup>85</sup>

80 N. W. 564; *Heins v. Lincoln*, 102 Iowa 69, 71 N. W. 189.

*Louisiana.* *Breaux's Bridge v. Dupuis*, 30 La. Ann. 1105; *Mandeville v. Band*, 111 La. Ann. 806, 35 So. 915.

*Minnesota.* *State v. Darrow*, 65 Minn. 419, 67 N. W. 1012; *State v. Dakota County*, 41 Minn. 518, 43 N. W. 389.

*Missouri.* *Saxton v. Beach*, 50 Mo. 588; *Saxton v. St. Joseph*, 60 Mo. 153; *Thomson v. Boonville*, 61 Mo. 282; *Irvin v. Devors*, 65 Mo. 625; *Trenton v. Coyle*, 107 Mo. 119, 17 S. W. 643; *Carondelet v. Wolfert*, 39 Mo. 305; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Cape Girardeau v. Fougau*, 30 Mo. App. 551.

*New Jersey.* *Booth v. Bayonne*, 56 N. J. L. 268, 28 Atl. 381.

*New York.* *People v. Schroeder*, 76 N. Y. 160.

*Oregon.* *Ladd v. East Portland*, 18 Ore. 87, 22 Pac. 533; *Babbidge v. Astoria*, 25 Ore. 417, 42 Am. St. Rep. 796.

*Pennsylvania.* *Kepner v. Commonwealth*, 40 Pa. St. 124; *Jones v. Schuylkill L. H. & P. Co.*, 202 Pa. St. 164, 51 Atl. 762.

And the ordinance must be signed before its promulgation to be operative. *New Iberia v. Moss Hotel Co.*, 112 La. 526, 36 So. 552.

Ordinance determining the lowest bid for furnishing hose and awarding a contract therefor, held to be a "legislative act," requir-

ing the mayor's signature. *Gleason v. Peerless Mfg. Co.*, 37 N. Y. S. 267, 1 App. Div. 257.

Certain ordinance relating to sanitary affairs required to be approved by board of health, without power of amendment. The board may at first refuse and afterwards approve. *Darcantel v. People's Slaughter-House & R. Co.*, 44 La. Ann. 632, 11 So. 239.

Town by-laws to be approved by court or justice thereof, when. Does not apply to ordinances of Boston. *Com. v. Lagorio*, 141 Mass. 81, 6 N. E. 546; *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577. 85. Mayor's approval not required.

*California.* *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630; *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 672, 82 Pac. 1069; *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 672, 82 Pac. 1071; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644.

*Illinois.* *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, 31 Ill. App. 314.

*Louisiana.* *McKenzie v. Woolley*, 39 La. Ann. 944, 3 So. 128.

*Massachusetts.* *Hibbard v. Suffolk Co.*, 163 Mass. 34, 39 N. E. 285.

*New Jersey.* *Burlington v. Denison*, 42 N. J. L. 165.

*Ohio.* *Fisher v. Graham*, 1 Cincinnati (Ohio) 113; *State v. Henderson*, 38 Ohio St. 644.

It has been held in Alabama that the mayor need not sign a revised code of ordinances which had been copied

If the legislative intent to the contrary is not clear an ordinance passed as the law requires, published and going into force is not void because not signed by the mayor or president of the council. *McKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128; *Opelousas v. Andrus*, 37 La. Ann. 699.

**Approval of Resolutions.** Approval of resolution required. Charter of San Francisco, art. II, ch. 1, § 16; *Chaffee v. Granger*, 6 Mich. 51; *Booth v. Bayonne*, 56 N. J. L. 268, 28 Atl. 381; *Wain v. Philadelphia*, 99 Pa. St. 330; *Kepner v. Com.*, 40 Pa. St. 124; Charter of New York, ch. 1, § 40; *Laws of N. Y.* (1897), p. 14; *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

Approval of resolution not required. *Smith v. Utica*, 53 Hun (N. Y.) 638, 6 N. Y. 792.

By charter of Jersey City only such resolution and ordinances as are in their nature final need be approved by mayor. Resolutions relating to intermediate proceedings cannot be said to go into effect, and therefore need not be approved. *Howeth v. Jersey City*, 30 N. J. L. 93.

A resolution of a council referring a petition for a sewer to the committee on sewerage does not require mayor's signature. *State v. Jersey City*, 30 N. J. L. 148.

A resolution appointing commissioners to assess damages and benefits in street opening proceeding in place of others resigned need not be approved by mayor.

*or. State v. Jersey City*, 25 N. J. L. 309.

Mayor need not approve appointments to office by council although he must approve ordinances and resolutions. *State ex rel. v. Miller*, 45 N. J. L. 251.

Not required in selection of officers by council. *Haight v. Love*, 39 N. J. L. 14; *McDermott v. Kenny*, 45 N. J. L. 251; *North v. Cary*, 4 Thomp. & C. (N. Y.) 357.

Where council has exclusive power of removal, a resolution relating thereto need not be approved by the mayor. *State v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118.

Mayor not required to approve bid of sale accepted by council resolution. *Straub v. Pittsburgh*, 138 Pa. St. 356, 22 Atl. 93.

As to approval in particular case, see *Knight v. Kansas City*, 70 Mo. 231.

As to power of mayor to veto action of council in appointing officers under particular charter, see *People v. Fitchie*, 76 Hun (N. Y.) 80, 28 N. Y. S. 600.

**Presumption as to signing.** Signing by mayor will be presumed, in the absence of evidence to the contrary. *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532.

Parol to prove signature. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.

**Signing ordinance.** Under a statute not conferring the veto power on the mayor the requirement that he sign ordinances is direct

at length on the record, signed by him, and which record showed that he voted for it on its passage.<sup>86</sup>

Where the mayor's approval is required, a vetoed resolution returned by him and subsequently altered by the council, in order to meet the mayor's objections, which is again passed becomes a new resolution and must again be submitted to the mayor.<sup>87</sup>

Charters vary respecting the time in which the mayor's approval is to be given.<sup>88</sup>

tory and the act of signing, a ministerial one, so that he cannot indirectly, by withholding his signature, exercise the veto power which the statute withholds. *Commonwealth v. Williams*, 27 Ky. L. Rep. 695, 86 S. W. 553.

86. **Revised code of ordinances.** The court remarked: "The matter of substance is the approval of the ordinance by the mayor, and not the form or manner in which it may be manifested, so that it is plainly manifested in writing, as all corporate action of this character must be manifested. Signing the ordinance, or an endorsement upon it, is not the only mode in which approval can be manifested. \* \* \* All of the purposes of the statute are satisfied, when the approval distinctly and affirmatively appears upon the corporate records or files which bear his signature, though the ordinance is not signed by him. The rule might be different if \* \* \* the statute contained negative or restraining words." *Woodruff v. Stewart*, 63 Ala. 206, 214, 215.

87. *Padavano v. Fagan*, 66 N. J. L. 167, 48 Atl. 998.

88. *Pennsylvania G. G. Co. v. Scranton*, 97 Pa. St. 538; *Detroit v. Moran*, 46 Mich. 213, 9 N. W. 252; *State ex rel. v. Carr*, 67 Mo. 38, 1 Mo. App. 490; *McMichael v. Inter-County St. Ry. Co.*, 167 Pa. St. 126, 31 Atl. 477, 36 Wkly. Notes Cas. 179; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417.

Ordinance passed by former administration cannot be approved by new mayor. *Altman v. Dubuque*, 111 Iowa 105, 82 N. W. 461.

Mayor cannot act after expiration of his term. *In re Front Street*, 24 Pa. Co. Ct. Rep. 88.

A formal and literal presentation to mayor must be shown—there can be no waiver of such requirement. *Ashley v. Newark*, 25 N. J. L. 399.

Provision extends to all acts, legislative or otherwise. *People v. Schroeder*, 76 N. Y. 160.

Evidence of presentation in particular cases. *Knell v. Buffalo*, 54 Hun (N. Y.) 80, 7 N. Y. S. 233; *Gleason v. Peerless Mfg. Co.*, 1 App. Div. 257, 37 N. Y. S. 267.

One legally acting as mayor may approve the ordinance.<sup>89</sup> In the absence of the mayor, the presiding officer of the legislative body is generally authorized to approve or disapprove.<sup>90</sup>

The requirement as to the approval is not satisfied by mere approval of the council journal.<sup>91</sup> The resolution or ordinance itself must be signed.<sup>92</sup> Thus the mere signature of the mayor as president of the council to the minutes of the proceedings has been held not to constitute approval of a resolution forfeiting a lease made by the corporation.<sup>93</sup> The mayor's approval must

89. O'Mally v. McGinn, 53 Wis. 353, 10 N. W. 515; Seattle v. Doran, 5 Wash. 482, 32 Pac. 105.

If the charter so requires the ordinance must be signed by the mayor proper or *pro tempore*, otherwise it is void. Ex parte Bedell, 20 Mo. App. 125.

Signing by presiding officer and attesting by clerk, held sufficient. Hammond v. New York, C. & St. L. Ry. Co., 5 Ind. App. 526, 31 N. E. 817.

90. Saleno v. Neosho, 127 Mo. 627, 48 Am. St. Rep. 653, 27 L. R. A. 769, 30 S. W. 190; Babbidge v. Astoria, 25 Ore. 417, 42 Am. St. 796, 36 Pac. 291; Parker v. Astoria, 25 Ore. 425, 36 Pac. 293.

When president of council cannot approve. Leavenworth v. Douglass, 3 Kan. App. 67, 44 Pac. 1099; Detroit v. Moran, 46 Mich. 213, 9 N. W. 252.

Temporary chairman cannot approve. Moore v. Perry, 119 Iowa 423, 93 N. W. 510.

Mayor's clerk cannot. Lyth v. Buffalo, 48 Hun (N. Y.) 175.

91. Whitney v. Port Huron, 88

Mich. 268, 26 Am. St. Rep. 291, 50 N. W. 316; State v. Wilder, 211 Mo. 305, 109 S. W. 574; Mulligan v. Lexington, 126 Mo. App. 715, 105 S. W. 104.

But revised ordinances may be so approved. Woodruff v. Stewart, 63 Ala. 206.

92. Altman v. Dubuque, 111 Iowa 105, 82 N. W. 461; State v. Dakota County, 41 Minn. 518, 43 N. W. 389.

93. Graham v. Carondelet, 33 Mo. 262, 268, 269.

The presence of the mayor during the deliberations of the council, and an examination by him of the clerk's minutes, by which he is informed of the passage of certain resolutions, is not such a presentation to him of the original resolutions as the charter requires. Whether the mayor's signature and approval to the copies recorded in the minutes, is sufficient evidence of the presentation of the original resolutions, and a sufficient approval of them, is questioned. State v. Newark, 25 N. J. L. 399, 402-411.

be in writing notwithstanding the existence for many years of a custom to the contrary.<sup>94</sup>

### § 692. Veto of mayor.

Charters often confer upon the mayor the power to disapprove all or certain legislation of the council or governing body, and, in event of veto, to give the act the force of law, it is required to pass the legislative body by a designated vote, usually two-thirds or three-fourths.<sup>95</sup>

94. New York, etc. R. R. v. Waterbury, 55 Conn. 19, 10 Atl. 162.

Under a charter requiring ordinances to be signed by the presiding officer, and attested by the clerk, and to be recorded, the defects cannot be rendered by a motion. Bills v. Goshen, 117 Ind. 221, 3 L. R. A. 261, 20 N. E. 115.

Merely suggesting amendments to a resolution does not relieve the mayor of the duty to sign and return the resolution. Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081.

Signature by the mayor, as such, and not by the mayor as *ex officio* president of the board of aldermen, held valid. Becker v. Washington, 94 Mo. 375, 7 S. W. 291.

As to method of designation of clerk where his signature is necessary to validate ordinances. Ex parte Guerrero, 69 Cal. 88, 10 Pac. 261.

As to the proper authentication and signature of ordinances, see the following cases: Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; Taylor v. Palmer, 31 Cal. 241; Ceighton v. Manson, 27 Cal. 613; Martindale v. Palmer, 52 Ind. 411;

Waln v. Philadelphia, 99 Pa. St. 330; Kepner v. Commonwealth, 40 Pa. 124; Dey v. Jersey City, 19 N. J. Eq. 412; State (Howeth) v. Jersey City, 30 N. J. L. 93; State v. Hudson, 5 Dutch. (29 N. J. L.) 475; State v. Henderson, 38 Ohio St. 644; Knight v. K. C. St. J. & C. B. R. R., 70 Mo. 231; In re Stadiford, 5 Mackey (16 D. C.) 549.

Mere mistake as to precise date of approval will not invalidate. Allentown v. Grim, 109 Pa. St. 113.

Calling an election by mayor to submit resolution extending corporate limits to voters does not constitute approval of resolution. Moore v. Perry, 119 Iowa 423, 93 N. W. 510.

95. Illinois. Starr & Curtis Ill. Stat., p. 686, par. 47.

Indiana. Acts 1899, p. 125; Landes v. State, 160 Ind. 479, 67 N. E. 189.

Michigan. Kindermann v. West Bay City, 117 Mich. 516, 76 N. W. 10, 5 Det. Leg. N. 330.

New Jersey. State v. Hoboken, 52 N. J. L. 88, 18 Atl. 685.

New York. Charter New York, ch. 1, § 40; Laws N. Y. (1897), pp. 14, 15.



In some charters the power of veto is denied.<sup>96</sup> The provision requiring the mayor's veto to contain his reasons therefor or objections to the proposed legislation has been held mandatory and hence a failure in this respect renders the disapproval unavailing.<sup>97</sup> Merely writing a letter suggesting amendments is not a compliance with the charter.<sup>98</sup>

Where a resolution is passed by the requisite majority over the mayor's veto, refusal on his part to sign the order for the money appropriated by the resolution may be compelled by *mandamus*. "To permit the mayor to again interpose the same objection would invest him

Under a statute giving the mayor power to veto any measure, the mayor cannot veto the election of a police justice by the board of aldermen, as an election is not a "measure" within the meaning of the statute. *Rich v. McLaurin*, 83 Miss. 95, 35 So. 337.

In North Dakota, the veto power extends to resolutions, at least to those of a legislative, as distinguished from an administrative, character. *State v. Duis*, 17 N. D. 319, 116 N. W. 751.

The council cannot pass a resolution over the mayor's veto by the adoption of another which is neither in form nor substance the same as the one vetoed, though intended to accomplish the same purpose. Such new resolution must be again submitted to the mayor for his approval or veto. *People v. Geneva*, 90 N. Y. S. 275, 98 App. Div. 383.

96. *Com. v. Kepner*, 30 Leg. Int. (Pa.) 312; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *Wyoming v. Wilkesbarre W. S. Ry. Co.*, 8 Luz.

Leg. Reg. (Pa.) 113; *Hall v. Racine*, 81 Wis. 72, 50 N. W. 1094.

**Veto of judicial action denied.** Under a charter providing that, the mayor "shall have a negative upon the action of the aldermen in laying out highways, and in all other matters; and no vote can be passed or appointment made by the board of aldermen over his veto, unless by a vote of two-thirds at least of all the aldermen elected," the mayor is not authorized to veto the judicial action of a board of aldermen, sitting as a court, and determining the election of its members. *Cate v. Martin*, 70 N. H. 135, 40 Atl. 54, 48 L. R. A. 613.

Veto power discussed. *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630.

97. *Casey v. Dedman*, 191 Mass. 370, 77 N. E. 717; *Truesdale v. Rochester*, 33 Hun (N. Y.) 574, 577.

98. *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377.

with a power over appropriations not intended by the charter." 89

Charters generally provide that where the ordinance contains several items appropriating money the mayor may object to one or more items separately while approving other portions of the ordinance.<sup>1</sup> Sometimes this executive privilege is extended to ordinances containing several items fixing a tax levy.<sup>2</sup>

### § 693. Return of bill or ordinance by mayor.

The method and time within which bills, after approval or veto, shall be returned by the mayor are usually prescribed by the charter. Unless the return is made within the time named, with the disapproval, the ordinance becomes a law.<sup>3</sup>

Where a charter provides that, if the municipal assembly shall finally adjourn within ten days after the bill has been presented to the mayor, the mayor shall, within ten days after such adjournment, return such bill to the city register, with his approval or reasons for disap-

99. *State (Ahrens) v. Fiedler*, 43 N. J. L. 400, 405.

1. Charter of St. Louis, art. III, § 24; Mun. Code of St. Louis (1901, McQuillin), p. 208; The Revised Code of St. Louis (1907, Woerner), p. 314; *King v. Chicago*, 111 Ill. 63.

2. Charter of San Francisco, art. II, ch. 1, § 14; Statutes and Amendments to the Codes of Cal., p. 245.

3. *California*. Charter of San Francisco, art. II, ch. 1, § 16; Stat. & Amend. to Codes of Cal. (1899), 246.

*Florida*. *Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. Rep. 558, 7 So. 885.

*Illinois*. 1 Starr & Curtis Ill. Stat., p. 686, par. 47.

*Iowa*. *Stutsman v. McVicar*, 111 Iowa 40, 82 N. W. 460.

*Massachusetts*. *Doty v. Lyman*, 166 Mass. 318, 44 N. E. 337.

*Missouri*. *Saleno v. Neosho*, 127 Mo. 627, 30 S. W. 190, 48 Am. St. Rep. 190, 27 L. R. A. 769.

*New York*. Charter of New York, ch. 1, § 40, Laws of N. Y. (1897), p. 15.

*Oregon*. *Babbidge v. Astoria*, 25 Ore. 417, 42 Am. St. Rep. 796, 36 Pac. 291.

*Pennsylvania*. *Com. v. Fitler*, 136 Pa. St. 129, 20 Atl. 129; *Pa. Globe Gas Light Co. v. Scranton*, 97 Pa. St. 538.

*Wisconsin*. *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450.

proval, otherwise the bill shall become a law as if approved; when after presentation of a bill to the mayor the municipal assembly adjourned *sine die* before the ten days expire and before the mayor signs the bill, it does not become a law, otherwise it would be in the power of the assembly by such adjournment to nullify the charter and dispense with the concurrence of the mayor.<sup>4</sup> Under such charter, an ordinance is not invalid because of its having been filed by the mayor in the city register's office instead of being returned to the house in which it originated, it appearing that both houses had adjourned on the day it was presented to the mayor.<sup>5</sup> But adjournment from day to day is not such an adjournment as would prevent the return within the time prescribed.<sup>6</sup>

Placing a veto in the hands of a clerk of the council on the evening of the last day on which it should be returned, after making an ineffectual attempt to gain admittance to the clerk's office in the afternoon, is suffi-

4. State ex rel. v. Carr, 67 Mo. 38, 1 Mo. App. 490.

Return of bill by mayor. Under a charter requiring that, unless a bill be returned by the mayor within ten days after it shall have been "presented to him," it shall become a law, a bill taken to the mayor's office during his absence and endorsed by the clerk as "Received July 3, 1903," but which was not seen by the mayor until July 6, was held not "presented" until the latter date, and a veto on July 14th was valid. Farwell v. Boston, 192 Mass. 15, 77 N. E. 303.

A pler right adopted by a board of aldermen of one branch of a municipal legislative body and by the other branch, assistant aldermen, in the following year and approved by the mayor is valid

under charter provisions that a resolution or ordinance passed which shall not be returned by the mayor within ten days, shall become a law, etc., unless "the 'close' of the session of the common council shall prevent its return"; the word "close" referring only to the end of the year when the new members came in. The continuity of the council being recognized, authorized the conclusion of the business of the prior year. In re New York, 193 N. Y. 503, 87 N. E. 759.

5. Barber A. P. Co. v. Hunt, 100 Mo. 22, 27, 18 Am. St. Rep. 530, 8 L. R. A. 110, 13 S. W. 98; State ex rel. v. Mead, 71 Mo. 266; Knight v. Kansas City, etc. R. Co., 70 Mo. 231.

6. Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432.

cient.<sup>7</sup> Placing a bill beyond the executive control constitutes a return of it.<sup>8</sup> Failure of the clerk to certify the time on the ordinance when it was presented to and returned by the mayor will not invalidate it.<sup>9</sup>

Where the legislative department of the corporation is composed of two houses or branches, charters generally prescribe that the ordinance shall be returned by the mayor to the house or branch in which it originated.<sup>10</sup> In Pennsylvania it has been held that this requirement is directory merely, since no harm can follow from failure to observe it.<sup>11</sup> In one case the ordinance passed the second branch of the council first, but was returned by the mayor to the first branch. The ordinance had been drafted by the board of estimates and submitted by it to the council for approval. Here it was held that, as the ordinance did not originate in either branch, it might be returned to either.<sup>12</sup>

#### § 694. Ordinances passed and approved by electors.

Under some municipal charters, as for example, San Francisco, certain franchise ordinances, as those to supply light or water, or for the lease or sale of any public utility or for the purchase of land of more than a named value (e. g., \$50,000) are required to be submitted to the electors of the municipality.<sup>13</sup> And under

7. *Baar v. Kirby*, 118 Mich. 392, 76 N. W. 754.

8. *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432.

9. *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

Mere error as to date of approval held immaterial. *Allentown v. Grim*, 109 Pa. St. 113.

10. Charter New York, ch. 1, § 40; Laws of N. Y. (1897), p. 14; Charter St. Louis, art. III, § 23; Mun. Code of St. Louis (1901, McQuillin), p. 208; The Revised Code of St. Louis (1907, Woerner), p. 313.

11. *Com. v. Fitler*, 136 Pa. St. 129, 20 Atl. 129.

12. *Baltimore v. Gorter*, 93 Md. 1, 48 Atl. 445.

13. Charter of San Francisco, art. II, ch. 1, § 21; Stat. and Amend. to Codes of Cal. (1899), 247.

**Referendum.** Under the constitution of Oklahoma and an act of the legislature making the same effective a referendum may be had by filing a petition with the chief executive officer of a municipality. *Ex parte Wagner*, 21 Okla. 33, 95 Pac. 435.

the same charter any ordinance may be passed by the electors by presenting a petition, signed by fifteen per cent of the voters, to the election commissioners, who are required to submit the proposed ordinance to the people. Ordinances so passed cannot be repealed by the

Under the charter of the City of Dallas, Texas, the city has power to pass ordinances to fix telephone rates under the initiative and referendum, without notice to the telephone company other than the ordinary notice of election at which the ordinance is to be voted on. Such provision has been held constitutional and the exercise of such power in the manner prescribed is consonant with a republican form of government. *Southwestern Telegraph Co. v. Dallas* (Tex. Civ. App., 1910), 131 S. W. 80.

Transient orders of the council to a particular person are not included within the meaning of a constitutional provision reserving the referendum for "municipal legislation," and are not subject to the referendum. *Long v. Portland*, 53 Ore. 92, 98 Pac. 144, affirmed on rehearing 98 Pac. 1111.

A provision of a city charter granting to the people a general right of initiative and a limited right of referendum with respect to franchise ordinances is a lawful exercise of legislative power. *State ex rel. v. Portland Ry., Light & Power Co.* (Ore. 1910), 107 Pac. 958; *Long v. Portland*, 53 Ore. 92, 98 Pac. 149.

The Constitution of Oregon as amended in 1906, reserves to the people of every municipality, city or town the general right of referendum as to municipal legisla-

tion, without laying down rules by means of which such right may become effective or be in force; and was therefore, held to be not self-executing. *State ex rel. v. Portland Ry. Light & Power Co.* (Ore., 1910), 107 Pac. 958; *Long v. Portland*, 53 Ore. 92, 98 Pac. 149, affirmed on rehearing 98 Pac. 1111.

A petitioner for a referendum under a city charter may subsequently, within the proper time, withdraw his signature from the petition. *State ex rel. v. Seattle* (Wash. 1910), 109 Pac. 309.

"The rule which permits a withdrawal at any time before final action upon the petition is much more likely to get at the real and mature judgment of the voters, and is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question." *County Court v. Pogue*, 115 Ill. App. 391, 400, affirmed in 213 Ill. 302, 72 N. E. 906; quoted with approval in *State ex rel. v. Seattle* (Wash. 1910), 109 Pac. 309.

One who signs a petition for a referendum has a sufficient interest to maintain an action to restrain the city and its officers from acting under an ordinance without submitting it to the voters as required by the referendum provisions of the charter. *State ex rel. v. Seattle* (Wash., 1910), 109 Pac. 309.

legislative body; this question is to be submitted to the electors.<sup>14</sup> Under some charters certain ordinances are required to receive the approval of the qualified electors of the local corporation by vote before they take effect.<sup>15</sup>

## § 695. Recording ordinances.

Charters often provide that after passage ordinances

14. Charter of San Francisco, art. II, ch. 1, § 20; Stat. and Amend. to Codes of Cal. (1899), 246, 247; Charter of Los Angeles, Cal.; Statutes & Amendments to Codes of Cal. (1903), p. 574, § 198b.

15. *Crebs v. Lebanon*, 98 Fed. 549.

Establishment of a system of waterworks. *Taylor v. McFadden*, 84 Iowa 262, 50 N. W. 1070; *Centerville v. Fidelity & Guaranty Co.* (U. S. C. C. A.), 118 Fed. 332.

After establishment, an ordinance increasing the number of hydrants need not be so approved. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

Vacation of street. *Lamm v. Chicago, etc. R. R. Co.*, 45 Minn. 71, 47 N. W. 455.

Extension of municipal territory. *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510; *Parker v. Zeisler*, 73 Mo. App. 537.

Ordinance forbidding animals from running at large not required to be so approved. *Batsel v. Blaine*, 4 Tex. App. 195, 15 S. W. 233.

Bonds. *Kearney v. Woodruff* (U. S. C. C. A.), 115 Fed. 90; *Le Tourneau v. Duluth* (Minn., 1902), 83 N. W. 529; *Wilkins v. Waynes-*

*boro*, 116 Ga. 359, 42 S. E. 767; *Beatrice v. Edminson* (U. S. C. C. A.), 117 Fed. 427.

Two propositions—one for street paving and one for constructing a bridge—held valid. *Maybin v. Biloxi*, 77 Miss. 673, 28 So. 566; *State ex rel. v. Allen*, 178 Mo. 555.

Where the tax is for two purposes, as for example, to pay interest on bonds and to provide for public improvements it is necessary that these propositions should be separately submitted to the voters. *Woodlawn v. Cain*, 135 Ala. 369, 33 So. 149.

In Louisiana it has been held that in obtaining authority for electors to incur a debt it is not necessary that the debt to be incurred for each particular purpose should be specially set out. Application of the special tax to be thus raised in detail, within the purposes authorized is committed to the discretion of the corporate authorities. If wrong application should be attempted an injunction will lie. *Gray v. Bourgeois*, 107 La. 671, 32 So. 42.

Ordinance authorized the erection of lighting system. *Carthage v. Carthage Light Co.*, 97 Mo. App. 20, 70 S. W. 936.

and resolutions shall be duly recorded.<sup>16</sup> The requirement is designed to furnish record evidence of their existence. Whether failure to record will invalidate the ordinance or resolution depends upon the proper construction of the provisions of the particular charter. Under most charters the requirement is held directory merely.<sup>17</sup> It has been held that an ordinance passed for

16. **Recording ordinances. Resolutions to be recorded.** *Kepner v. Commonwealth*, 40 Pa. St. 124; *Wain v. Philadelphia*, 99 Pa. St. 330; *Charter San Francisco*, art. II, ch. 1, § 17; *Statutes and Amendments to the Codes of Cal.* (1899), p. 246.

Resolution need not be recorded unless required by charter. It may be proved by parol. *Darlington v. Commonwealth*, 41 Pa. St. 68.

All acts and votes should be recorded. *Logan v. Tyler*, 1 Pitts. (Pa.) 244.

Subject to exceptions declared by §§ 683, 684, of the Iowa Code, the record of a resolution of the council need not show the aye and nay vote. *Sawyer v. Lorenzen & Weise* (Iowa, 1910), 127 N. W. 1091.

17. *California.* *People v. Cole*, 70 Cal. 59, 11 Pac. 481; *Central Irrigation District v. De Lappe*, 79 Cal. 351, 21 Pac. 825.

*Illinois.* *Whalin v. Macomb*, 76 Ill. 49.

*Indiana.* *Shea v. Muncie*, 148 Ind. 14, 33, 46 N. E. 138; *Martindale v. Palmer*, 52 Ind. 411, 414.

*Iowa.* *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510; *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *Conboy v. Iowa City*, 12 Iowa 90.

*Louisiana.* *Crowley v. Rucker*,

107 La. 213, 31 So. 629; *Bathurst v. Course*, 3 La. Ann. 260.

*New York.* *Wiggin v. New York*, 9 Paige (N. Y.) 16.

*Pennsylvania.* *Barton v. Pittsburgh*, 4 Brews. (Pa.) 373.

When ordinances to be recorded—illustrations. In re-enactment of ordinances, recording may be omitted. *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *Tipton v. Norman*, 72 Mo. 380.

It is not necessary to repeat recording in each successive revision of the ordinances. *Ex parte Bedell*, 20 Mo. App. 125, 130.

When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act, to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made. *St. Louis v. Foster*, 52 Mo. 513; *St. Louis v. Alexander*, 23 Mo. 483, 509; *Dart v. Bagley*, 110 Mo. 42, 19 S. W. 311; *Attorney-General v. Heldorn*, 74 Mo. 410; *State ex rel. v. Ranson*, 73 Mo. 78, 93; *Kamerick v. Castleman*, 21 Mo. App. 587.

Provision that all ordinances, by-laws and resolutions be recorded in a separate book kept for that

a special purpose in order to carry out an act of the legislature, outside of the charter, need not be recorded, in accordance with the charter provision.<sup>18</sup> The act of recording is regarded as a mere clerical or ministerial duty and not essential to complete the legislative act unless made so by express legal provisions.<sup>19</sup>

In a Pennsylvania case the charter provided that all ordinances "shall be recorded in a book to be kept at the office of the burgess, which shall be free to public inspection, and no ordinance \* \* \* shall be carried into operation in less than two weeks after the same shall be so recorded." "Such provision calls for no discussion whether it is mandatory or directory, for it plainly expresses the condition upon the performance

purpose, held directory with respect to the particular book in which the record shall be made. *Upington v. Oviatt*, 24 Ohio St. 232, 241.

On change of a borough to a city by act of the legislature, containing provision that existing ordinances shall remain in force, provided they be recorded within four months thereafter, the proviso was held merely directory, and non-compliance does not affect its validity. *Trustees of Erie Academy v. Erie*, 31 Pa. St. 515.

18. *Amey v. Allegheny City*, 24 How. (65 U. S.) 364, 374.

19. *Stevenson v. Bay City*, 26 Mich. 44; *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

Complying with requirement as to recording. Failure through oversight to copy the ordinance or resolution on the city records does not affect its validity. *Crebs v. Lebanon*, 98 Fed. 549.

Method of recording. *Klais v. Pulford*, 36 Wis. 587.

Ordinances printed and posted

in the record book of proceedings of the board of trustees is a sufficient recording. *Eubanks v. Ashley*, 36 Ill. 177, approving *Teft v. Size*, 10 Ill. 432.

Publication of the ordinances in book form, complies with the provisions requiring recording. *Allen v. Davenport*, 107 Iowa 90, 98, 77 N. W. 532.

Sufficient compliance. *Hammond v. N. Y. C. & St. L. Ry. Co.*, 5 Ind. App. 526, 31 N. E. 817; *In re Tunkhannock Borough*, 3 Pa. Co. Ct. Rep. 480.

After an ordinance is duly recorded its validity cannot be affected by subsequent unauthorized alteration or interlineations. *Houston, etc. R. Co. v. Odum*, 53 Tex. 343, 352.

Amendment of record. *Samis v. King*, 40 Conn. 298.

Subsequent ratification. *Schenley v. Com.*, 36 Pa. St. 29, 78 Am. Dec. 359; *Com. v. Marshall*, 69 Pa. St. 328.

See §§ 706, 709, *post*.



of which, after two weeks, the ordinance shall be carried into operation, and no ingenuity can make the ordinance operative before.”<sup>20</sup>

### § 696. Deposit and custody of ordinances.

It is usual for charters to provide that all ordinances and resolutions shall be deposited with the clerk or other municipal officer.<sup>21</sup> Production of the original ordinance by the clerk, the legal custodian of the instrument, is *prima facie* evidence to show that it was deposited with that official.<sup>22</sup>

In one case the charter required all ordinances to be deposited in the office of the clerk before they became effective. An ordinance required all ordinances to be “filed” instead of deposited. It was held that an ordinance is in legal effect filed when it is delivered to the proper officer and by him received to be kept on file. “The deposit with the proper officer is the thing essential, of which the filing is but evidence.”<sup>23</sup>

Under a charter provision requiring all ordinances to be recorded in a book to be provided for that purpose and to be kept by the mayor, an ordinance duly enacted, published and recorded was held valid although the book containing it was kept in the council chamber and not in the mayor’s office.<sup>24</sup>

### § 697. Publication of ordinances and notice of pendency.

As all valid ordinances have the force of law within the municipal territory,<sup>25</sup> are binding upon inhabitants

20. Per Turnkey, J., in Appeal of Borough of Verona, 108 Pa. St. 83, 89; Marshall v. Com., 59 Pa. St. 455; Schwartz v. Oshkosh, 55 Wis. 490, 13 N. W. 450.

21. Charter San Francisco, art. II, ch. 1, § 17; 1 Starr & Curtis Ill. Stat., p. 686, par. 47; Charter, St. Louis, art. III, § 28; Mun. Code of St. Louis (1901, McQuill-

lin), 223; The Revised Code of St. Louis (1907, Woerner), p. 339.

22. Schofield v. Tampico, 98 Ill. App. 324, 326.

23. McGregor v. Lovington, 48 Ill. App. 202, 207.

24. Beaumont v. Wilkes-Barre, 142 Pa. St. 198, 218, 21 Atl. 888.

25. § 643 *ante*.

and strangers,<sup>26</sup> operative upon property within the corporate limits,<sup>27</sup> and all persons upon whom they are binding are bound to take notice thereof,<sup>28</sup> it would seem to be a reasonable requirement that notice of their existence should be given in some appropriate manner before they are permitted to take effect. In recognition of such necessity, publication of the ordinance after passage, or sufficient notice thereof before it takes effect, is generally expressly required,<sup>29</sup> especially of police ordi-

26. § 654 *ante*.

27. § 655 *ante*.

28. § 653 *ante*.

29. Provisions relating to publication. *California*. Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Sacramento Paving Co. v. Anderson, 1 Cal. App. 672, 82 Pac. 1069; Sacramento Paving Co. v. Martyn, 1 Cal. App. XVIII, 82 Pac. 1071.

*Illinois*. Tisdale v. Minonk, 46 Ill. 9; Raker v. Maquon, 9 Ill. App. 155; Loughridge v. Huntington, 56 Ind. 253.

*Iowa*. Larkin v. Burlington, etc. R. R. Co., 91 Iowa 654, 60 N. W. 195; Albia v. O'Harra, 64 Iowa 297, 20 N. W. 444.

*Kansas*. Pittsburg v. Reynolds, 48 Kan. 360, 29 Pac. 757; Leavenworth v. Douglass, 3 Kan. App. 67, 44 Pac. 1099.

*Kentucky*. Louisville v. Roberts & Krieger, 32 Ky. L. Rep. 182, 823, 105 S. W. 431.

*Michigan*. Boehme v. Monroe, 106 Mich. 401, 64 N. W. 204; Thornton v. Sturgis, 38 Mich. 639; Van Alstine v. People, 37 Mich. 523.

*Nebraska*. Bailey v. State, 30 Neb. 855, 47 N. W. 208.

*New Jersey*. Hoboken v. Gear, 27 N. J. L. 265.

*New York*. Watkins v. Hiller-

man, 73 Hun (N. Y.) 317, 26 N. Y. S. 252; De Loge v. New York Central, etc. R. R. Co., 157 N. Y. 688, 92 Hun (N. Y.) 149.

*Wisconsin*. Janesville v. Dewey, 3 Wis. 245.

Sometimes publication in a volume of revised ordinances constitutes sufficient publication. Topoka v. Crawford, 78 Kan. 583, 96 Pac. 862.

Some laws do not provide for publication. Paducah v. Ragdale, 28 Ky. L. Rep. 1057, 92 S. W. 13.

In Kentucky under a statute requiring the publication of city ordinances, the fact of proper publication will be presumed in the absence of an affirmative showing to the contrary. Muir's Adm'rs v. Bardstown, 27 Ky. L. Rep. 1150, 87 S. W. 1096.

The re-enactment and republication of a tax levy ordinance cures any defect in the publication of the original ordinance. Muir's Adm'rs v. Bardstown, 27 Ky. L. Rep. 1150, 87 S. W. 1096.

Ordinances in force at the date of the adoption of the code chapter on "Municipalities," continue in force and do not require republication. Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015.

nances and those providing penalties and forfeitures.<sup>30</sup>

For like reasons municipal charters frequently provide for the publication of certain kinds of ordinances or resolutions prior to passage, or notice that the ordinance or resolution is pending for passage. This is usually required in providing for improvements which are paid for in whole or in part by special assessment or by the extraordinary exercise of the power of special taxation,<sup>31</sup> and all of those ordinances which directly affect the property rights of the citizen. Due notice of contemplated action upon the part of the municipal authorities is a wise and salutary rule, and is rigidly enforced by the courts as a fundamental constitutional right.<sup>32</sup>

Provisions respecting publication and sufficient notice are generally held mandatory, and hence failure to publish in substantially the manner prescribed renders the ordinance or resolution void.<sup>33</sup> However, when such pro-

30. *State v. Noblesville*, 157 Ind. 31, 60 N. E. 704; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Union Pac. R. Co. v. McNally*, 54 Neb. 112, 74 N. W. 390; *Stuhr v. Hoboken*, 47 N. J. L. 147; *Oak Grove v. Juneau*, 66 Wis. 534, 29 N. W. 644; *Winnfield v. Grigsby*, 126 La. 929, 53 So. 53.

31. *Harvey v. Aurora*, 186 Ill. 283, 57 N. E. 857; *Byrnes v. River-ton*, 64 N. J. L. 210, 44 Atl. 857; *Cape May v. Cape May, etc. R. Co.*, 60 N. J. L. 224, 37 Atl. 892; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135.

32. Chapter on public improve-ments.

Where the general public notice required by law was given, the owner of a swinging sign held not entitled to a special notice prior to the enforcement of the ordi-

nance against him. *Sands v. In-habitants of Trenton* (N. J. Sup., 1904), 57 Atl. 267.

33. *Arkansas. Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955.

*California. People v. Cole*, 70 Cal. 59, 11 Pac. 481; *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900; *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *People v. Grant*, 48 Colo. 156, 111 Pac. 69.

*Connecticut. Higley v. Bunce*, 10 Conn. 436, 567.

*Illinois. Newland v. Aurora*, 14 Ill. 364; *Barnett v. Newark*, 28 Ill. 62; *Elizabethtown v. Laffer*, 23 Ill. 90; *Illinois Central R. R. v. People*, 161 Ill. 244, 43 N. E. 1107; *Standard v. Industry*, 55 Ill. App. 523; *Hutchison v. Mt. Vernon*, 40 Ill. App. 19.

*Indiana. Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261, 20 N. E. 115; *Meyer v. Fromm*, 108 Ind.

visions are applicable and publication required, and when they are to be held directory merely, depends upon the proper construction of the particular charter or statute applicable, and sometimes largely upon the special facts

208, 9 N. E. 84; *Bumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Loughridge v. Huntington*, 56 Ind. 253.

*Iowa.* *Conboy v. Iowa City*, 2 Iowa 90; *Starr v. Burlington*, 45 Iowa 87; *Dubuque v. Wooton*, 28 Iowa 571.

*Maryland.* *Baltimore v. Johnson*, 62 Md. 225; *Baltimore v. Little Sisters of the Poor*, 56 Md. 400.

*Michigan.* *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *People v. Keir*, 78 Mich. 98, 43 N. W. 1039.

*Minnesota.* *Warsop v. Hastings*, 22 Minn. 437.

*Missouri.* *Rumsey Mfg. Co. v. Schell*, 21 Mo. App. 175.

*Nebraska.* *Union Pac. R. R. Co. v. McNally*, 54 Neb. 112, 74 N. W. 390; *Union Pac. R. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Blackburn v. Moores*, 86 Neb. 761, 126 N. W. 312.

*New Jersey.* *North Baptist Church v. Orange*, 54 N. J. L. 111, 22 Atl. 1004; *State v. Long Branch Com'rs*, 54 N. J. L. 484, 24 Atl. 368; *State v. Morristown*, 34 N. J. L. 445; *Rutgers' College A. A. v. New Brunswick*, 55 N. J. L. 279, 26 Atl. 87; *State v. Plainfield*, 38 N. J. L. 95; *Daives v. Hightston*, 45 N. J. L. 127; *State v. Hudson*, 29 N. J. L. 475; *Byrnes v. Riverton*, 64 N. J. L. 210, 44 Atl. 857.

*New York.* *Kneib v. People*, 50

*How. Pr. (N. Y.)* 140; *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134, 4 Hun (N. Y.) 545; *Matter of Brassford*, 50 N. Y. 509, 63 Barb. (N. Y.) 161; *People v. Board of Health*, 33 Barb. (N. Y.) 344; *Schnectady v. Furman*, 61 Hun (N. Y.) 171, 15 N. Y. S. 724; *Matter of Anderson*, 60 N. Y. 457; *Matter of Levy*, 4 Hun (N. Y.) 501.

*North Dakota.* *O'Hare v. Park River*, 1 N. D. 279, 47 N. W. 380.

*Ohio.* *Smith v. Columbus, etc. R. R. Co.*, 8 Ohio N. P. 1; *State v. Cincinnati*, 8 Ohio Cir. Ct. Rep. 523, 8 Ohio Cir. Dec. 689.

*Oklahoma.* *Stillwater v. Moor* (Okla., 1893), 33 Pac. 1024.

*Pennsylvania.* *Marshall v. Com.*, 59 Pa. St. 455; *Waln v. Philadelphia*, 99 Pa. St. 330; *Olds v. Erie City*, 79 Pa. St. 380.

*Vermont.* *Barre v. Perry & Scribner*, 82 Vt. 301, 73 Atl. 574.

*Washington.* *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135.

*Wisconsin.* *Quint v. Merrill*, 105 Wis. 406, 81 N. W. 664; *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364; *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830; *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450; *Clark v. Janesville*, 10 Wis. 136; *Janesville v. Dewey*, 3 Wis. 245.

*United States.* *Nat. Bank of Commerce v. Grenada*, 44 Fed. 262, reversing 41 Fed. 87, 10 U. S. App. 692, affirmed in 48 Fed. 278.

of each case. When the matter relates purely or mainly to form, courts usually adopt a liberal construction.<sup>34</sup>

34. *State v. Wimpfheimer*, 69 N. H. 166, 38 Atl. 786.

**When publication required—illustrative cases.** "By-laws of general or permanent nature," as used in Iowa Code relating to publication, includes a city ordinance granting a franchise. *State v. Omaha & C. B. Ry. Co.*, 113 Iowa 30, 84 N. W. 983.

Ordinances for expenditure of money. *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580; *Barr v. New Brunswick*, 58 N. J. L. 255, 37 Atl. 477.

Ordinances providing for loan, *National Bank of Commerce v. Grenada*, 44 Fed. 262, reversing 41 Fed. 87.

Required—resolution. *Central v. Sears*, 2 Colo. 588; *State v. Darrow*, 65 Minn. 419, 67 N. W. 1012.

Provisions as to publication held directory. *Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385; *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451.

Statutory provision respecting publication held not to apply to a city created by special charter. *Pitts v. District of Opelika*, 79 Ala. 527; *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451.

State laws requiring printing legal notices, etc., held not to apply to municipal ordinances. *Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757.

Contract, ministerial function. *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 454.

Does not apply to "orders" or "resolutions," when. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325; *Elmendorf v. New York*, 25 Wend. (N. Y.) 693.

Ordinance by board of health declaring a nuisance, notice of passage need not be given. *Yonkers Board of Health v. Copcut*, 140 N. Y. 12, 35 N. E. 443.

Ordinance imposing a penalty or forfeiture for violation, required to be published. Held, ordinance removing officer for drunkenness not such. *State v. Noblesville*, 157 Ind. 31, 60 N. E. 704.

When ordinances may become a law without publication under special charter provisions, see *Schweitzer v. Liberty*, 82 Mo. 309.

Providing for election. *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206.

Publication of digest of ordinances, held directory. *Whalin v. Macomb*, 76 Ill. 49.

Not required in re-enactment or continuation of similar ordinances duly published. *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *Tipton v. Norman*, 72 Mo. 380, 385; *Ex parte Bedell*, 20 Mo. App. 125, 130.

When re-enactment constitutes a new enactment, and not merely a continuation of the old law, see *Emporia v. Norton*, 16 Kan. 236.

Where provisions as to publication are directory, mere failure to publish will not invalidate an ordinance. *Reed v. Louisville*, 22 Ky. L. Rep. 1636, 61 S. W. 11.

### § 698. Time and frequency of publication.

The time and frequency of publication is usually controlled by charter.<sup>35</sup> Substantial compliance with the charter in this respect is necessary in order to render valid the ordinance.<sup>36</sup> In the absence of charter specification, the time during which the publication is to be made must be fixed by the legislative body; it cannot be designated by a mere ministerial officer.<sup>37</sup> In one case where the charter prescribed no time it was held that publication five days after the passage of the ordinance was sufficient.<sup>38</sup>

Under a charter requiring publication for twenty days, publication once each week for three weeks successively is a sufficient compliance.<sup>39</sup> So under a law directing publication to be for five successive days, the publication may be for five successive week days notwithstanding Sunday intervenes, on which there was no issue of the paper in which the publication was made.<sup>40</sup> A publica-

Failure to publish as required by statute does not invalidate, where it has been duly approved and signed by the mayor, and a section thereof provided that the ordinance should be in force from and after its passage. *Johnson v. Finley*, 54 Neb. 733, 74 N. W. 1080.

Provision as to publication of council proceedings, held directory. *Reed v. Louisville*, 22 Ky. L. Rep. 1636, 61 S. W. 11.

35. Time of publication. *Standard v. Industry*, 55 Ill. App. 523; *Hoboken v. Gear*, 27 N. J. L. 265; *Truchelut v. City Council*, 1 Nott & McCord (S. C.) 227.

The revision of a city charter making it necessary to publish ordinances of the common council before the same shall take effect, does not by implication make it necessary to publish in like man-

ner ordinances adopted by the board of excise commissioners of the same city. *Crocker v. Board of Excise Com'rs of Camden*, 73 N. J. L. 460, 63 Atl. 901.

36. *Van Alstine v. People*, 37 Mich. 523.

37. *Thornton v. Sturgis*, 38 Mich. 639.

38. *St. Paul v. Coulter*, 12 Minn. 41, 90 Am. Dec. 278.

39. *Hoboken v. Gear*, 27 N. J. L. 265; *Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271.

40. *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310.

Sundays and holidays to be counted. *Taylor v. Palmer*, 31 Cal. 240.

Publication on Sunday does not render an ordinance invalid. *Hallett v. U. S. Security & Bond Co.*, 40 Colo. 261, 90 Pac. 632.

tion for fourteen consecutive days complies with a provision requiring publication for "at least two weeks."<sup>41</sup> Three weeks means twenty-one days and not simply three insertions.<sup>42</sup> Under a charter provision requiring notice of the introduction of an ordinance to be published at least ten days before its adoption, one insertion thereof at least ten days prior to the adoption of the ordinance is sufficient.<sup>43</sup>

Where the law requires publication in a newspaper of general circulation or in a book or pamphlet, one publication in a Sunday newspaper of an ordinance will be sufficient.<sup>44</sup>

### § 699. Method of publication.

The charter method of publication of by-laws, ordinances and proceedings of the legislative body should be followed.<sup>45</sup> Ordinances are promulgated in book or pamphlet form, printed in newspapers or posted in public

Publication from time prescribed is sufficient, though last day was on Sunday. *Barber Asphalt Pav. Co. v. Muchenberger*, 105 Mo. App. 47, 51, 78 S. W. 280.

41. *Derby & Co. v. Modesto*, 104 Cal. 515, 38 Pac. 900.

42. *Loughridge v. Huntington*, 56 Ind. 253.

Publication once a week. *Commonwealth v. Matthews*, 122 Mass. 60; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *State v. Hardy*, 7 Neb. 377.

43. *Smith v. Atlanta*, 123 Ga. 877, 51 S. E. 741.

44. *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580.

**Time and frequency of publication under various charters.** *San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Schweitzer v.*

*Liberty*, 82 Mo. 309; *Cape Girardeau v. Fongeu*, 30 Mo. App. 551; *Union Pac. R. R. Co. v. McNally*, 54 Neb. 112, 74 N. W. 390; *Lawson v. Gibson*, 18 Neb. 137, 24 N. W. 447; *Hull v. Chicago, etc. R. R. Co.*, 21 Neb. 371, 32 N. W. 162; *Union Pac. R. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619.

Where the charter provides that an ordinance shall not take effect until published one week in the official paper of the city, held sufficiently published if it appeared in every issue for a given week, there being no Monday issue. *Richter v. Harper*, 95 Mich. 221, 54 N. W. 968.

45. *People v. Grant*, 48 Colo. 156, 111 Pac. 69; *State v. Hoboken*, 38 N. J. L. 110, 113; *Hoboken v. Gear*, 27 N. J. L. 265.

places.<sup>46</sup> Concerning the newspaper in which publication is to be made under various laws, a few illustrations may be given. A weekly publication containing current news, matters of general interest and local happenings, is a newspaper within the meaning of the statute requiring the publication of city ordinances, though it has a very limited circulation.<sup>47</sup> Where a statute requires that a newspaper in which an ordinance is published, shall have been published a year prior to the date of the publication of the ordinance, publication in a newspaper that had not been published the requisite length of time is invalid.<sup>48</sup> Under a statute providing that all resolutions and ordinances requiring publication be published in newspapers of "opposite politics," a lexicographer's definition of the term cannot control, and an independent newspaper does not satisfy the requirement, distinct party allegiance to opposing parties being the test.<sup>49</sup>

46. Pamphlet or newspaper. *Standard v. Industry*, 55 Ill. App. 523.

Book form or pamphlet. *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *Moss v. Oakland*, 88 Ill. 109; *Baker v. Maquon*, 9 Ill. App. 155; *Union Pac. R. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Union Pac. R. R. Co. v. McNally*, 54 Neb. 112, 74 N. W. 390.

Newspaper notice of ordinances insufficient, when. *Keckely v. Road Commissioners*, 4 McCord (S. C.) 463.

47. *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549.

48. *Lewis v. Newark*, 74 N. J. L. 308, 65 Atl. 1039.

49. *Columbus v. Barr*, 27 Ohio Circ. Ct. Rep. 264.

Newspaper in which publication is to be made. *San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Haskill v. Bartlett*, 34 Cal.

281; *Kerr v. Hitt*, 75 Ill. 51; *Tisdale v. Minonk*, 46 Ill. 9; *Larkin v. Burlington, etc. R. R. Co.*, 85 Iowa 492, 52 N. W. 480; *Bayard v. Baker*, 76 Iowa 220, 40 N. W. 818; *Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757; *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769; *State (Bayer) v. Hoboken*, 44 N. J. L. 131; *In re Astor*, 50 N. Y. 363; *Kellogg v. Carrico*, 47 Mo. 157; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Gallerno v. Rochester*, 46 Up. Can. Q. B. 279.

Designation of newspaper, when directory, see *In re Smith*, 65 Barb. (N. Y.) 283.

Posting. *Reg. v. Huntingdon*, 4 Q. B. Div. 522, 29 Moak 61.

In newspaper in which the ordinances were usually published is sufficient promulgation. *Truchelut v. City Council*, 1 Nott & McCord (S. C.) 227, 230.



Usually the publication is required to be in the English language.<sup>50</sup> Where no language is specified in the law, English is meant.<sup>51</sup>

Under a charter specifying that all ordinances shall be published in a German newspaper, in the absence of legal direction to the contrary, they must be printed

Extra edition of newspaper and distribution of fifty or one hundred copies of such edition is not a newspaper of general circulation. *State v. Omaha & C. B. Ry. & B. Co.*, 113 Iowa. 30, 84 N. W. 983.

Sunday publications held valid. *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580; *Hastings v. Columbus*, 42 Ohio St. 585; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075.

Publication with council proceedings, held sufficient. *Law v. People ex rel.*, 87 Ill. 385.

Publication in book form, posting or newspaper. *Moss v. Oakland*, 88 Ill. 109; *Baker v. Maquon*, 9 Ill. App. 155; *Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363.

Inaccurate print of certain words will not invalidate, if not misleading. *Moss v. Oakland*, 88 Ill. 109.

So mistake of date of enactment is not material. *Vincent v. Pacific Grove*, 102 Cal. 405, 36 Pac. 773.

Circulating ordinance with local paper, although printed elsewhere, is sufficient. *Ex parte Biddell*, 20 Mo. App. 125, 130, 131.

Mode of publication under particular provision. *People v. Supervisors of City and County of*

*San Francisco*, 27 Cal. 655; *Vincent v. Pacific Grove*, 102 Cal. 405, 36 Pac. 773; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *In re Guerrero*, 69 Cal. 88, 10 Pac. 261; *Byars v. Mt. Vernon*, 77 Ill. 467; *Raquer v. Maquon*, 9 Ill. App. 155; *Dubuque v. Wooton*, 28 Iowa 571; *State v. Smith*, 22 Minn. 218; *State v. Hoboken*, 44 N. J. L. 131; *Chamberlain v. Hoboken*, 38 N. J. L. 110; *In re Phillips*, 60 N. Y. 16; *In re Little*, 60 N. Y. 343; *In re Anderson*, 60 N. Y. 457; *In re N. Y. Public School*, 47 N. Y. 556; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *Wasem v. Cincinnati*, 2 Cin. R. (Ohio) 84.

Publication of ordinances relating to salaries, when to take effect. *Stuhr v. Hoboken*, 47 N. J. L. 147.

50. *Chicago v. McCoy*, 136 Ill. 344, 11 L. R. A. 413, 26 N. E. 363, 33 Ill. App. 576; *Breaux's Bridge v. Dupuis*, 30 La. Ann. 1105, distinguishing *Loze v. New Orleans*, 2 La. 427, holding publication in French only sufficient; *City Pub. Co. v. Jersey City*, 54 N. J. L. 437, 24 Atl. 571.

51. *Wilson v. Trenton*, 56 N. J. L. 469, 29 Atl. 183; *Cincinnati v. Bickett*, 26 Ohio St. 49; *State v. Cincinnati*, 8 Ohio Cir. Ct. Rep. 523; *Graham v. King*, 50 Mo. 22.

in English, for an ordinance has no legal existence except in the language in which it is passed.<sup>52</sup>

Publication of the ordinance alone is sufficient to give it validity, without a publication of the law authorizing it. All persons are charged with notice of a law upon which an ordinance is founded.<sup>53</sup> The whole ordinance must be published.<sup>54</sup> But other ordinances affected by the new enactment need not be published.<sup>55</sup> So where the ordinance establishing grades of streets refers to maps and books on file, the latter need not be published with the ordinance; only that which is entered in the ordinance book need be published.<sup>56</sup> The name of the presiding officer of the council at the time of the passage of an ordinance is not a necessary part of the publication.<sup>57</sup>

Where the law allows alternate modes of publication of ordinances, as that they shall not be in force until published four weeks in a newspaper printed in the town, or in the town nearest to such town in which a newspaper is printed, or in some other newspaper generally circulated where such by-law is made as the town shall direct, the town must point out one of the three described newspapers in which the by-laws should be published, and a failure to so do will invalidate the by-law. Under such provision a publication made by order of the clerk

52. *State (North Baptist Church) v. Orange*, 54 N. J. L. 111, 14 L. R. A. 62, 22 Atl. 1004; see *Wasem v. Cincinnati*, 2 Cin. Super. Ct. (Ohio) 84.

German newspaper. *Kernitz v. Long Island City*, 50 Hun (N. Y.) 428; *Upper Hanover Road*, 44 Pa. St. 277; *In re North Whitehall Tp.*, 47 Pa. St. 156; *German P. & P. Co. v. Illinois S. Z. Co.*, 55 Ill. 127.

53. *People ex rel. v. San Francisco*, 27 Cal. 655.

54. *People v. Russell*, 74 Cal. 578, 16 Pac. 395.

55. *Ex Parte Christensen*, 85 Cal. 208, 27 Pac. 747.

56. *Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253.

57. *Bumb v. Evansville*, 168 Ind. 272, 80 N. E. 625.

without direction from the proper corporate authorities is void.<sup>58</sup>

### § 700. Amendment on passage.

Charters provide, as state constitutions, that no ordinance shall be so amended on its passage as to change its original purpose.<sup>59</sup> This purpose means the general purpose of the bill or ordinance, and not the mere details through which and by which that purpose is manifested or effectuated.<sup>60</sup>

Usually amendments are required to be incorporated with the bill or ordinance by engrossment. And before final action is taken a report is made by a committee that the bill is truly engrossed and correct.<sup>61</sup>

After amendment, under some charters, the ordinance must be laid over for a specified time, as one week, before its final passage.<sup>62</sup>

A charter provision to the effect that, no ordinance or by-law shall be enacted or passed unless the same shall

58. *Higley v. Bunce*, 10 Conn. 436.

Where the law does not prescribe the time of publication it must be fixed by the legislative body and not by a mere ministerial officer. *Thornton v. Sturgis*, 38 Mich. 639.

When clerk may designate the paper, if council fails, see *In re Durkin*, 10 Hun (N. Y.) 269.

Order for publication may be embraced in the ordinance. *In re Guerrero*, 69 Cal. 88, 10 Pac. 261.

Proof of publication, how made, and presumptions, see ch. 23, Evidence of Municipal Ordinances.

Violating the law in exceeding debt limit to pay for publication does not invalidate the ordinance. *Kimble v. Peeria*, 140 Ill. 157, 29 N. E. 723.

59. Charter San Francisco, art. II, ch. 1, § 8; Statutes and Amendments to Codes of Cal. (1899), p. 245; Charter of St. Louis, art. III, § 13; Mun. Code of St. Louis (McQuillin), p. 205; The Revised Code of St. Louis (1907, Woerner), p. 310.

60. Rule applied to act of legislature. *State ex rel. v. Mason*, 155 Mo. 486, 54 S. W. 524.

61. Charter of St. Louis, art. III, § 16; Mun. Code of St. Louis (McQuillin), p. 206; The Revised Code of St. Louis (1907, Woerner), p. 311.

62. Charter San Francisco, art. II, ch. 1, § 13; Statutes and Amendments to Codes of California (1899), p. 245.

have been introduced at a previous regular meeting operates as a limitation when amendments are made. In a New Jersey case, at a regular meeting the ordinance was introduced. It provided for laying out and opening a public street, and contained the names of the commissioners for this purpose, who were required to be appointed by ordinance and not otherwise. At a subsequent meeting the ordinance was taken up, the name of one of the commissioners stricken out and another inserted, and then adopted. The ordinance was held illegal because it materially varied from that introduced at the previous meeting. The court was of the opinion that the variance was in the most important part of the ordinance and that to permit such changes to be so made would defeat the precise object of the charter, which was to insure deliberation in every important proceeding.<sup>63</sup>

But a slight alteration of the title in no wise affecting the construction of the ordinance will be held immaterial.<sup>64</sup> Thus the title of an ordinance concerning inns and taverns and retailers of liquor may be amended on its passage by striking out the word "retailers" and inserting "dealers," since the change is immaterial.<sup>65</sup>

### § 701. Publication of amendments on passage.

Certain kinds of ordinances, as those providing for specific improvements, granting franchises or privileges, involving leases, appropriating or disposing of public property, expenditures of public money (except in small sums), levying a tax or assessment, providing for the

63. *State (Ackerman) v. Bergen*, 33 N. J. L. 39; *State v. Jersey City*, 34 N. J. L. 429; *Cowen v. Wildwood*, 60 N. J. L. 365, 38 Atl. 22.

64. *State ex rel. v. Jersey City*, 26 N. J. L. 444, 448.

65. *State ex rel. v. Washington*, 44 N. J. L. 605, 610, 43 Am.

Rep. 402; *Thornhill v. Stephany*, 66 N. J. L. 171, 48 Atl. 573.

See § 701 *post*.

Amendments made during passage need not be read on different days, as required with respect to the bill or ordinance. *Chillicothe v. Logan Natural Gas, etc. Co.*, 3 Ohio N. P. 88; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436.

imposition of a new duty or penalty, are, under some charters, required to be published before final action is taken thereon, and if amended during passage the ordinance, as amended, is to be advertised for a specified period before final action is taken thereon.<sup>66</sup>

It has been held in New Jersey that, in the absence of a charter provision amendments need not be published prior to passage under a provision requiring an ordinance to be published after introduction and before final action.<sup>67</sup> And in Illinois, it was ruled that where an ordinance for an improvement was duly published, and subsequently amended the ordinance is not void because only the amendatory ordinance and not the entire ordinance as amended was published.<sup>68</sup>

Where the charter requires an ordinance to be published between its second and third reading, a material amendment cannot be made after the second reading, without the publication and notice prescribed by the charter.<sup>69</sup> But an ordinance ordering a vote of the tax payers supplemented by an amendment after the original was advertised is not rendered void, where it appeared that such amendment does not vary from the substance of the original.<sup>70</sup>

## § 702. Consideration of mayor's veto.

Charters differ somewhat respecting the method and time of consideration of the bill or ordinance when it is returned with the mayor's objections. Objections to appropriations and tax levies are usually required to be

66. Charter San Francisco, art. II, ch. 1, § 13; Statutes and Amendments to Codes of Cal. (1899), p. 245.

67. *East Orange v. Richardson*, 71 N. J. L. 458, 59 Atl. 897.

68. *People v. Burke*, 206 Ill. 358, 69 N. E. 45.

69. *State ex rel. v. Newark*, 30 N. J. L. 303.

70. *Mackenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128.

See § 700, *ante*.

made by items, and each item so objected to is to be separately reconsidered.<sup>71</sup>

Under some charters reconsideration cannot take place until after the expiration of five days and within thirty days from the return by the mayor.<sup>72</sup> Under a charter which required reconsideration "at the next regular meeting thereafter" (after return), it was held that an ordinance passed over the veto at the meeting at which it was returned was void.<sup>73</sup> Under a charter providing that, when the ordinance with the objections is returned, "and if two-thirds of the members then present \* \* \* shall agree to said ordinance, notwithstanding such objections, then, but not otherwise, said ordinance shall have the force of law," etc., it was held that the reconsideration must take place at such meeting and that it could not be adjourned to a subsequent meeting.<sup>74</sup>

Where the rule prevails that the council is a continuous body, the mayor's veto may be considered notwithstanding an election may have intervened and several new members have been admitted.<sup>75</sup>

71. Charter San Francisco, art. II, ch. 1, § 14; Statutes and Amendments to Codes of Cal. (1899), p. 246; St. Louis, art. III, § 24; Mun. Code of St. Louis (McQuillin), p. 208; The Revised Code of St. Louis (1907, Woerner), p. 314.

72. Charter San Francisco, art. II, ch. 1, § 16; Statutes and Amendments to Codes of Cal. (1899), p. 246.

73. *Gleason v. Peerless Mfg. Co.*, 37 N. Y. S. 267, 1 App. Div. 257, 163 N. Y. 574; *Peck v. Rochester*, 3 N. Y. S. 872.

Under some charters every bill returned vetoed "shall stand as reconsidered in the house to which it is returned," and after entering objections on the journal the house shall "proceed at its convenience to consider the pending question." Charter St. Louis, art. III, § 25; Mun. Code of St. Louis, p. 208; Revised Code of St. Louis (1907, Woerner) p. 314.

74. *In re Opening of Robin St.*, 1 La. Ann. 412.

75. *People v. Buffalo*, 108 N. Y. S. 331, 123 App. Div. 141.

See § 604 *ante*.

After the ordinance has been reconsidered and the vote taken, in accordance with the charter, it cannot again be reconsidered.<sup>76</sup>

### § 703. Courts will not inquire into legislative motive.

The general rule is well established that courts will not inquire into the motives of legislators where they possess the power to do the act and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them.<sup>77</sup> And this principle is generally

76. §§ 612-614 *ante*; Ashton v. Rochester, 133 N. Y. 187, 60 Hun (N. Y.) 372.

"The idea was suggested on argument that there is no affirmative declaration that in event of failure to overrule the mayor's veto by the constitutional number, that the ordinance would be a nullity. This was not necessary. The mode of testing the question being prescribed, together with the result, in case of the overthrow of the veto, is the exclusion of all other modes and results. The maxim, *expressio unius est exclusio alterius*, expresses the idea in such a contingency. Indeed, it has been said, and I think truly, that anything prescribed by constitution is a prohibition of all other modes that might be devised for doing it. All, after the constitutional method is exhausted, is *ultra vires* the lawful power of the body, and of non-effect." Sank v. Philadelphia, 4 Brews. (Pa.) 133, 8 Phila. 117, per Thompson, C. J.

When resolution, passed over veto in particular case. Caswell v. Bay City, 99 Mich. 417, 58 N. W. 331.

77. *United States*. Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148.

*California*. Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432.

*Illinois*. Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651.

*Indiana*. Lilly v. Indianapolis, 149 Ind. 648, 49 N. E. 887; McCulloch v. State, 11 Ind. 424, 431; Wright v. Defrees, 8 Ind. 298, 302.

*Louisiana*. State v. Davidson, 50 La. Ann. 1297, 69 Am. St. Rep. 478, 24 So. 324.

*Michigan*. People v. Gardner, 143 Mich. 104, 106 N. W. 541.

*Missouri*. Kiley v. Forsee, 57 Mo. 390; Young v. St. Louis, 47 Mo. 492; Dreyfus v. Lonergan, 73 Mo. App. 336.

*New Jersey*. Moore v. Haddonfield, 62 N. J. L. 386, 41 Atl. 946.

*New York*. Stuyvesant v. New York, etc., 7 Cow. (N. Y.) 588; Kittinger v. Buffalo Traction Co., 160 N. Y. 377.

*Pennsylvania*. Pottsville Borough v. Pottsville Gas Co., 39 Pa. Super. Ct. 1.

applied to purely legislative acts of municipal corporations.<sup>78</sup> In passing an ordinance legislative in character, relating to the police power and importing no private contract or right, "the members of the city council are entitled to the same privileges and prerogatives which belong to members of the state legislature."<sup>79</sup> Neither the motives of the members, nor the influences under which they acted, can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers.

"The legality of the acts of legislative or of corporate bodies cannot be tested by the motives of the individual

*Washington.* Wood v. Seattle, 23 Wash. 1, 62 Pac. 135; Shepard v. Seattle (Wash., 1910), 109 Pac. 1067.

*Wisconsin.* State v. Superior Court, 105 Wis. 651, 81 N. W. 1046.

"The legislature is a co-ordinate branch of the state government, and in the enactment of laws is entirely independent of the judiciary; and if the laws are otherwise legal, the courts have no power to annul or set them aside on the ground that the members acted from improper or unlawful views." Per Wagner, J., in State ex rel. Blakeman v. Hays, 49 Mo. 604, 607, 608.

78. People v. Cregier, 138 Ill. 401, 28 N. E. 812; Knoxville v. Bird, 12 Lea (Tenn.) 121, 47 Am. Rep. 326.

The council is a miniature general assembly, and its ordinances, duly authorized, have the force of laws passed by the state legislature. Taylor v. Carondelet, 22 Mo. 105.

79. Villavaso v. Barthet, 39 La. Ann. 247, 258, 1 So. 599; State ex rel. v. Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

**No inquiry into legislative motive.**

In considering a police ordinance, Mr. Justice Field said: "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U. S. 703, 710, 711, 5 Sup. Ct. 730, 28 L. Ed. 1145.



members, or the adventitious circumstances they may lay hold of to carry their measures, provided they proceed regularly and act within the scope of their powers. If they be regularly convened, if the purpose be lawful, and if their acts are passed in due form of law and within the scope of their authority, persons who lend their money on the faith of such acts, or do other lawful things in a just reliance upon their validity, cannot be affected by the secret springs of corporate action, and the public faith cannot be tarnished by the unseen influences surrounding it."<sup>80</sup>

Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good and are clothed with all the immunities of government, and are exempted from all liabilities for their mistaken use. They are not personally liable for the enactment of ordinances not authorized by the charter, nor are they liable upon a charge that they acted maliciously.<sup>81</sup>

80. The chief burgess being absent the assistant burgesses took advantage of the absence, convened and passed the ordinance. Per Agnew, J., in *Freeport v. Marks*, 59 Pa. St. 253, 257.

In *Paine v. Boston*, 124 Mass. 486, 490, it is said: "For, although the circumstances surrounding and accompanying the passage of the order (to pay money) may be given in evidence, it does not by any means follow that the motives, reasons and considerations which operated upon the minds of the members of the council to induce them to vote for an order which partakes so much of the character of legislation, are competent or proper."

81. *Jones v. Loving*, 55 Miss. 109, 111; *Anne Arundel Co. Com'rs v. Duckett*, 20 Md. 468; *Baker v. State*, 27 Ind. 485, 489.

Assessors are not liable, as their acts are judicial. *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117.

Election of officers. *Pike v. Me-goun*, 44 Mo. 491, per Wagner, J.

Motives that prompt the enactment of an ordinance cannot be considered by the court in determining whether the ordinance is reasonable and oppressive. *Bennett v. Pulaski* (Tenn. Ch. App.), 52 S. W. 913, 47 L. R. A. 278.

### § 704. Same—rule limited—ministerial act.

Judicial decisions have limited this doctrine in its application to municipal legislative bodies. Even though the act of the council is strictly legislative in character, all the courts do not view it as standing on precisely the same plane as an act of the state legislature. For, as mentioned in the preceding section, the rule is uniformly enforced that an act of the state legislature cannot be impeached in a court on the ground that its passage was obtained by fraud or corrupt influence, while, according to many decisions, an ordinance may be so assailed.<sup>82</sup>

The immunity from impeachment for fraudulent motives on the part of the legislative body does not rest upon the form assumed by the act. The municipal council like the state legislature, in the exercise of its purely legislative powers, is not subject to judicial control, but in the exercise of its *ministerial* or *administrative* powers this exemption does not apply. The usual manner of action on the part of the municipal legislative body is by ordinance, whether the act done is essentially legislative or merely ministerial or administrative in character. The distinction is based upon the capacity or relation in which the members act. In such case, the law regards the substance of the act, and not the form of its execution.

As stated by the Supreme Court of Missouri: "The form in which the act is expressed is immaterial; the act done denotes its character. A common council cannot shield a vulnerable ministerial act by covering it

82. *State ex rel. v. Gates*, 190 Mo. 540, 555, 556, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 547, 58 S. W. 934; *Knapp v. St. Louis*, 156 Mo. 343, 353, 56 S. W. 1102; *Kansas City v. Hyde*,

196 Mo. 498, 506, 96 S. W. 201, 113 Am. St. Rep. 766; *Glasgow v. St. Louis*, 107 Mo. 198, 203, 17 S. W. 743.

Compare *People v. Gardner*, 143 Mich. 104, 106 N. W. 541, and cases cited in § 703 *ante*.

with the form used to inclose a legislative act.”<sup>83</sup> Thus where the council was empowered to regulate the price

83. *State ex rel. v. Gates*, 190 Mo. 540, 558, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

**Distinction between ministerial and legislative acts.** *State ex rel. v. St. Louis*, 145 Mo. 151, 46 S. W. 981, 42 L. R. A. 113; *Donahoe v. Kansas City*, 136 Mo. 657, 665, 38 S. W. 571; *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *McKenna v. St. Louis*, 6 Mo. App. 320; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann. 188; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Illinois Trust and Sav. Bank v. Arkansas City*, 76 Fed. 271, 40 U. S. App. 257; *Spring Valley Waterworks v. Bartlett*, 8 Sawyer 555, 16 Fed. 615.

**Charge of fraud.** *People v. Cregler*, 138 Ill. 401, 28 N. E. 812; *Shinkle v. Covington*, 83 Ky. 420; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135; *Barhite v. Home Telephone Co.*, 63 N. Y. S. 659, 50 App. Div. 25.

An ordinance for improvement cannot be attacked in collateral proceedings by showing its passage was obtained fraudulently. *Buell v. Ball*. 20 Iowa 282.

**Inquiry into motive of members.** Where the nature of an ordinance is merely that of a contract by which the legislative body, in its ministerial, or administrative capacity is proposing to grant to certain individuals the use of its streets for certain pur-

poses and relinquish certain rights that the city had under its former contracts, the act is not legislative, and, in a proper case, under sufficient allegations, the court may investigate. *State ex rel. v. Gates*, 190 Mo. 540, 560, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

In Pennsylvania it has been held that the passage of a resolution by a council awarding a contract for street lighting is not a legislative, but a ministerial act in the nature of a business transaction relating to the management of municipal affairs. *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 542, 41 Atl. 454, 43 W. N. C. 236; *Shaub v. Lancaster City*, 154 Pa. St. 362, 26 Atl. 1067; *Howard v. Olyphant*, 181 Pa. St. 191, 37 Atl. 258.

Whether an act in ordering public improvements and passing ordinance therefor is judicial or ministerial, see *Parks v. Boston*, 8 Pick. (Mass.) 218; *Camden v. Mulford*, 26 N. J. L. 49, per Green, C. J.; *State (Vanatta) v. Morristown*, 34 N. J. L. 445; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463.

The adoption of an ordinance by a board of public works, giving permission to a railroad company to lay tracks in the streets was held to be a judicial act and is therefore voidable because done without previous notice to the interested persons. *State (West Jersey Traction Co.) v. Board of Public Works*, 56 N. J. L. 431, 29 Atl. 163.

of gas, and under the exercise of such power they, for a fraudulent purpose, passed the ordinance fixing the price of gas at a rate for which they well knew it could not be manufactured and sold without loss, it was held that the motives of the council could be properly inquired into.<sup>84</sup> In such relation the members of the council act in a ministerial capacity.

In New York it has been held that a city council in passing a resolution waiving a requirement of a contract for local improvement is not legislative in character, but administrative, and not being impressed with the character of sovereignty, the motives that induced it are the subject of judicial investigation.<sup>85</sup> Here it was ruled that the city may defend an action against the corporation on a contract as modified by resolution of the council, on the ground that the resolution is void because corruptly procured.<sup>86</sup>

### § 705. Injunction to restrain passage of ordinance.

Ordinarily the passage of an ordinance is a legislative act which, as a rule, a court of equity will not enjoin.<sup>87</sup>

84. *State v. Cincinnati Gas Co.*, 18 Ohio St. 262, 300, citing *Davis v. New York*, 1 Duer (N. Y.) 451.

85. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678.

See *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Cooley's Const. Lim.*, §§ 186, 187, 208.

86. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678.

87. *Alabama. Montgomery Gas-light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

*Colorado. Lewis v. Denver City Waterworks*, 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. 993.

*Illinois. Stevens v. St. Mary's T. School*, 144 Ill. 336, 18 L. R.

A. 832, 32 N. E. 962, 36 Am. St. Rep. 438; *Mason v. Shawneetown*, 77 Ill. 533; *Chicago v. Evans*, 24 Ill. 52; *Sherlock v. Winnetka*, 59 Ill. 389.

*Indiana. Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

*Louisiana. Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *Crescent City L. S. & S. H. Co. v. Jefferson Police Jury*, 32 La. Ann. 1192.

*Michigan. Detroit v. Hosmer*, Wayne Circuit Judge, 79 Mich. 384, 44 N. W. 622; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419.

"The general assembly is a co-ordinate branch of the state government, and so is the law-making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled."<sup>88</sup>

*New York.* Kittinger v. Buffalo Y. Co., 160 N. Y. 377; People ex rel. v. Queens County, 153 N. Y. 370; Talcott v. Buffalo, 125 N. Y. 280, 26 N. E. 263; Waterloo W. Mfg. Co. v. Shanahan, 128 N. Y. 345, 28 N. E. 358; People ex rel. v. Albertson, 55 N. Y. 50, 54; Warwick v. New York, 28 Barb. (N. Y.) 210; People v. New York, 32 Barb. (N. Y.) 35, 10 Abb. Pr. (N. Y.) 144, 19 How. Pr. (N. Y.) 155.

*Ohio.* Johnson v. Cincinnati (Ohio), 26 Wkly. Law Bul. 223.

*Pennsylvania.* Wheeler v. Philadelphia (Pa.), 23 Leg. Int. 75.

*Tennessee.* Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136.

*Wisconsin.* State ex rel. v. Circuit Court, 97 Wis. 1, 72 N. W. 193; State v. Superior Court, 105 Wis. 651, 81 N. W. 1046.

*United States.* New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 481, 17 Sup. Ct. 161, 41 L. Ed. 518; Angle v. C., St. P., M. & C. R. Co., 151 U. S. 3, 14 Sup. Ct. 240, 38 L. Ed. 55; United States v. Des Moines N. & R. Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; Alpers v. San Francisco, 32 Fed. 503, 12 Sawyer (U. S.) 631; Murphy v. East Portland, 42 Fed. 308.

Judicial discretion described. The judicial department "has no will in any case. \* \* \* Judicial power, as contradistinguished

from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Per Chief Justice Marshall in Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738, 866, 6 L. Ed. 204.

Courts will not restrain executive and administrative officers. Cherokee Nation v. Georgia, 5 Pet. U. S. 1, 8 L. Ed. 25; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. Ed. 483; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

Sec § 704 *ante* for distinction between legislative and ministerial or administrative acts of municipal legislative bodies.

88. Restraining passage of ordinance — illustrations. "A void law is no law, and this without doubt is true as to an ordinance. No injury, much less one of an irreparable character, can be inflicted by such an

“The exception to the rule would seem to be limited to cases where the governing body of the municipality has no power to act on the particular subject, legislatively, at all, or where the threatened act is not legislative, but purely ministerial, or where such body is clothed with certain powers, but threatens to go beyond or outside of such powers, and thereby invade the property or property rights of complainant, or where such body threatens to squander or divert some fund or property

ordinance.” *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756, distinguishing *People v. Sturtevant*, 9 N. Y. 263, and *Davis v. New York*, 14 N. Y. 506, 1 Duer (N. Y.) 451, where a city council was restrained from passing an ordinance creating a public nuisance in the streets.

“It never can be a rightful subject of legislation to create a public nuisance and if the passage of an ordinance, without more, created the nuisance, the mischief resulting therefrom might be irreparable.” *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 511, 24 Am. Rep. 756.

Question of injunction raised, but ordinance held valid. *Gartside v. East St. Louis*, 43 Ill. 47.

Injunction to restrain mayor from signing. *New Orleans E. R. Co. v. New Orleans*, 39 La. Ann. 127, 1 So. 434; *Dailey v. New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945.

Council restrained by injunction from passing resolution over mayor's veto. *People v. Dwyer*, 90 N. Y. 402, 1 Civ. Proc. Rep. (N. Y.) 484; *Smith v. McCarthy*, 56 Pa. St. 359; *Negus v. Brooklyn*, 62

*How. Pr. (N. Y.)* 291, 10 Abb. N. C. (N. Y.) 180.

Denied to prevent payment of alleged illegal claims. *Merriam v. Yuba County*, 72 Cal. 517, 14 Pac. 137.

Passage of ordinance prescribing payment of money will not be restrained. *Murphy v. East Portland*, 42 Fed. 308.

Will not enjoin the passage of an ordinance granting franchise for street railway. *Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106.

Court declined to restrain passage of ordinance giving exclusive privilege for twenty years of removing all dead animals not slain for food. *Alpers v. San Francisco Co.*, 32 Fed. 503.

Injunction refused to restrain passage of an ordinance permitting company to lay gas pipes violative of prior exclusive right to another company. *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756; *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616, 6 So. 113.

Ordinance vacating street will not be enjoined in absence of bad faith. *Meredith v. Sayre*, 32 N. J. Eq. 557.

held by it or some of its officials in trust for its tax payers and citizens.”<sup>89</sup>

The rule of the English courts, that for the usurpation of authority by public bodies, the remedy, until the passage of their municipal corporation acts, was exclusively in the name of the attorney-general, acting in behalf of the public, and that the individual had no redress until his personal property was affected by enforcement of the illegal proceedings, has been so far modified by judicial decisions in New Jersey that the tax payer may resort to *certiorari* for his protection against an illegal ordinance or resolution, without waiting until the assessment is actually imposed.<sup>90</sup>

89. Per Cassoday, C. J., in *State ex rel. v. Milwaukee Co.* Super. Ct., 105 Wis. 651, 677, 678, 81 N. W. 1046, reviewing and distinguishing many cases.

The question is treated in *State ex rel. v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

When injunction will prevent enactment of ordinances. Courts may enjoin passage of an ordinance which is beyond scope of power of municipal corporation, where its passage would work irreparable injury. In such case the city has no authority of any kind, legislative, judicial or administrative, to deal with the question at all. *Spring Valley Waterworks v. Bartlett*, 8 Sawyer (U. S.) 555, 16 Fed. 615; *Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136; *Public Ledger Co. v. Memphis*, 93 Tenn. 77, 23 S. W. 51; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *State v. Patterson*, 34 N. J. L. 163; *State v. Albright*, 20 N. J. L. 644.

Where an ordinance would be void on its face by reason of its

unconstitutionality, and no irreparable injury could result from its mere passage, there being an adequate remedy at law against any attempt to enforce it after its passage, a court of equity will not enjoin its enforcement. *Spring Valley Waterworks v. Bartlett*, 8 Sawyer (U. S.) 555, 16 Fed. 615.

The passage of ordinances which confer no rights or authority are harmless until steps are taken to make them available. *Chicago v. Evans*, 24 Ill. 52, 57.

Generally, when no damage can result injunction will be denied. *Harrison v. New Orleans*, 33 La. Assn. 222, 39 Am. Rep. 272; *Atkinson v. Wykoff*, 58 Mo. App. 86; *Whitney v. New York*, 28 Barb. (N. Y.) 233.

90. Violated charter. *State (Gregory) v. Jersey City*, 34 N. J. L. 390, 398, *et seq.*, per Depue, J.; *State (Danforth) v. Paterson*, 34 N. J. L. 163, 171; *State v. Jersey City*, 34 N. J. L. 31, 44.

Although ordinance is void, *certiorari* will not lie in favor of the prosecutors who have sustained

A municipal corporation has a dual character: one, governmental or public; the other, private or proprietary.<sup>91</sup> Hence, in a Kentucky case, it has been declared that, "the general proposition that a court of equity may not enjoin the passage of a municipal ordinance must be confined in its application to subjects over which the corporation in its governmental or public character has discretionary authority. And if it be conceded taxable inhabitants have a right to resort to equity at all, to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventative remedy may be applied at the inception of a wrongful act; in fact, when it is about to be done or threatened."<sup>92</sup>

### § 706. Validating void ordinance by municipality.

Irregular proceedings may be validated by subsequent acts on the part of the council or governing legislative

no damage peculiar to themselves. *State (Montgomery) v. Trenton*, 36 N. J. L. 79, 86, relying on *State (Kean) v. Bronson*, 35 N. J. L. 468.

91. § 87 *ante*.

*Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Louisville v. Commonwealth*, 1 Duval (Ky.) 295.

92. Restraining passage of an ordinance authorizing disposition of wharf property. *Roberts v. Louisville*, 92 Ky. 95, 107, 13 L. R. A. 844, 17 S. W. 216.

Withdrawal of an illegal ordinance after institution of action will not defeat the right to in-

junction against its enactment. *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844, 17 S. W. 216. Compare *Sherlock v. Winnetka*, 59 Ill. 389; *Milhau v. Sharp*, 15 Barb. (N. Y.) 194.

Acceptance of an ordinance granting franchise to street railway company will be enjoined where it constitutes an act *ultra vires*. *Cincinnati Street R. R. Co. v. Smith*, 29 Ohio St. 291.

City not liable for attempting to enforce void by-law, resulting from a misconception of its powers. *Pocock v. Toronto*, 27 Ontario Rep. 635.



body which constitute ratification of the former proceedings. This rule applies to the enactment of ordinances. Thus where an ordinance authorized the city to contract for curbing, and the work was done without a proper contract, the city council after the work was done can validate the action.<sup>93</sup> So where the agent of the city in contracting for street improvement failed to comply with the ordinance under the provisions of which the contract should have been made, it was held that as the contract was one which the city could authorize, it could waive the irregularity and adopt the contract by subsequent ordinance.<sup>94</sup> So a change of grade of a street which was made by the officers of a municipality without authority of ordinance may by subsequent ratification of the city council be validated.<sup>95</sup>

But obviously the municipality cannot by a subsequent act validate an unauthorized ordinance, one which is *ultra vires*, or beyond the scope of the municipal corporation to enact.<sup>96</sup> Thus an ordinance authorizing the execution of a contract for water works, which was passed before a constitutional amendment took effect giving the city power to create the indebtedness, is void, and the contract being *ultra vires* at the time it was made cannot be ratified afterwards by a subsequent ordinance.<sup>97</sup>

And it is a reasonable rule that to render subsequent proceedings evidence of the ratification of the ordinance, it should appear that the latter proceedings were taken

93. *Chester v. Eyre*, 181 Pa. St. 642, 37 Atl. 837.

94. *O'Rourke v. Hays*, 93 Pa. St. 72.

95. *Shilo Street*, 165 Pa. St. 386, 30 Atl. 986.

96. *Croft v. Danbury*, 65 Conn. 294, 32 Atl. 365.

97. *Ellis v. Cleburne* (Tex. Civ. App. 1896), 35 S. W. 495; *Cedar*

*Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

"If the act was void, because *ultra vires*, and they had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done." *Horn v. Baltimore*, 30 Md. 218, 222; *Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43.

with a full knowledge of the invalidity of such ordinance and all steps, if any, taken thereunder.<sup>98</sup>

### § 707. Curative power of legislature over void ordinances.

Acts done under and by virtue of ordinances passed by a municipal corporation, and proceedings entered into by it, within the scope of its power to act, which are void or defective by reason of some irregularity, omission or want of compliance with the law in the passage of the ordinance, may be cured and rendered valid unless there be a constitutional inhibition, by a subsequent act of the legislature, where the legislature originally had power to authorize the thing done.<sup>99</sup> Thus where a city

98. *McCracken v. San Francisco*, 16 Cal. 591.

99. *California. Holladay v. San Francisco*, 124 Cal. 352, 57 Pac. 146.

*Illinois. United States Mortgage Co. v. Gross*, 93 Ill. 483.

*Iowa. Marion Water Co. v. Marion*, 121 Iowa 306, 96 N. W. 883.

*Kansas. Emporia v. Norton*, 13 Kan. 569.

*Minnesota. Flynn v. Little Falls Electric & W. Co.*, 74 Minn. 180, 78 N. W. 106, 77 N. W. 38; *State v. Starkey*, 49 Minn. 503, 52 N. W. 24.

*Oregon. Noltage v. Portland*, 35 Ore. 539, 58 P. 883.

*Pennsylvania. Com. v. La Bar*, 7 Northampton (Pa.) 785, 5 Lack. L. News 229; *Schenley v. Com.*, 36 Pa. St. 29, 78 Am. Dec. 359; *Com. v. Marshall*, 69 Pa. St. 328.

*South Carolina. Truchelut v. Charleston*, 1 Nott. & M. (S. C.) 227.

Curative power of the legislature. The legislature may con-

firm municipal ordinances and proceedings irregularly adopted. *Hatzung v. Syracuse*, 92 Hun (N. Y.) 203, 36 N. Y. S. 521.

But an act of the legislature passed subsequent to the passage of a void ordinance, purporting to empower the local corporation to enforce any regulation heretofore made upon a particular subject, but not naming the ordinance in question, is inadequate to render the ordinance valid. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

In the ratification of a contract of a municipal corporation otherwise *ultra vires* by the legislature it will be assumed that the legislature had knowledge of what the contract so ratified was. Such ratification constitutes a permission to the municipal corporation to enter into the contract, unless it concludes to reconsider its former action. *Mayo v. Dover & Foxcroft Village Fire Co.*, 96 Me. 539, 53 Atl. 62.

by ordinance authorized a contract with a gas company and the issue of bonds of the city, but failed to observe a provision of the legislature, requiring that where a debt is created the means of paying its principal must be provided in the same ordinance, it was held that it was competent for the legislature to impose upon the city, by a curative act making the bonds valid, the payment of claims just in themselves, for which an equivalent has been received, but which for some irregularity or omission in the proceedings creating them cannot be enforced.<sup>1</sup> But where the city passed a void ordinance because not authorized by its charter, and not originally within the power of the legislature to grant the power to enact the ordinance, a curative act to validate the ordinance would be void.<sup>2</sup>

**§ 708. Same—proceedings to subscribe for railroad stock.**

Defects and irregularities in the passage of ordinances and in the proceedings to authorize an incorporated town to subscribe to the capital stock of a railroad company and to issue bonds for the same may be cured and ratified by a subsequent act of the legislature where the legislature had the power to authorize the act, or to impose or take away the conditions, the non-observance of which have caused the defects. However, this power is subject to the constitutional restrictions of the state, and cannot be exercised when it would interfere with vested rights.<sup>3</sup>

1. *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

2. *Stange v. Dubuque*, 62 Iowa 303, 17 N. W. 518; *Cain v. Goda*, 84 Ind. 209.

3. *People v. Lynch*, 51 Cal. 15; *Otoe Co. v. Baldwin*, 111 U. S. 1, 15, 4 Sup. Ct. 265, 28 L. Ed. 331; *Bridgeport v. Housatonic Ry. Co.*, 15 Conn. 475; *McMillen v. Boyles*, 6 Iowa 304; *St. Joseph Township*

*v. Rogers*, 16 Wall. (U. S.) 644, 663, 21 L. Ed. 328.

Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance." *United States Mortgage Co. v. Gross*, 93 Ill. 483, 494. Quoted with approval in

Thus in a case where bonds for a railroad had been issued and the stock subscribed for, and the objection was raised that the proof of the preliminary consent by tax payers was defective, it was held that the legislature had power to heal the defect and to sanction the action of the town commissioner in bonding the town. The court said: "The measure of consent on the part of the town and its tax payers or electors was fixable at the will of the legislature originally. If not, then the whole power must be denied, for the people of a locality cannot confer power upon the legislature, and if it originally rested with the legislature to fix the terms on which the towns might act, the same power will suffice to remit a part of the conditions imposed, or to heal any defects which may have occurred in the performance by the town of those conditions."<sup>4</sup>

But where, by reason of a change in the constitution, a state has no power to authorize a municipal corporation to issue negotiable bonds, it cannot validate an issue of bonds by such a corporation made before the change in the constitution, and when the legislature had such a power.<sup>5</sup> Where the voters of a city or county have expressed their consent by a requisite majority vote to subscribe for stock or issue bonds, which creates a debt upon the city, and the subscription is invalid either for the want of power to take the vote or some irregularity or defect in the proceedings, a curative act of the legislature legalizing and making valid the bonds, in the opinion of the Supreme Court of the United States, is not void as being in conflict with that clause of a state Constitution which prohibited the legislature from creat-

Anderson v. Santa Anna, 116 U. S. 356, 364, 6 Sup. Ct. 413, 29 L. Ed. 633, and Bolles v. Brimfield, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786.

\* As to power of municipal corporation to subscribe to stock of

railroads and private corporations, see §§ 393 to 395 *ante*.

4. Duanesburgh v. Jenkins, 57 N. Y. 177, 194.

5. Katzenberger v. Aberdeen, 121 U. S. 172, 177, 7 Sup. Ct. 947, 30 L. Ed. 911.

ing a debt against a municipal corporation for municipal purposes, without its consent.<sup>6</sup>

In holding that the curative act of the legislature did not violate the Constitution, the court, in *Bolles v. Brimfield*, said: "We do not disregard those decisions of the state court which hold that the legislature cannot impose a debt, for local corporate purposes, upon a municipal body, against the will of its corporate authorities. For, as often held by the state court, the corporate authorities of a town like Brimfield are its legal voters, and they at the election gave their consent to the subscription and bonds in question. We do not see that the subsequent ratification by the legislature of what had been done by the voters can be regarded as imposing a debt upon them against their will. The legislature simply gave effect to the wishes of the people, as expressed in the customary mode of ascertaining the popular will."<sup>7</sup>

#### § 709. Same—to collect taxes.

The legislature has power to legalize proceedings to collect taxes where the law has not been strictly pursued, in cases where the taxes were not invalid for want of jurisdiction, and where no constitutional rights of the

6. *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786; *Cowgill v. Long*, 15 Ill. 202; *Keithsburg v. Frick*, 34 Ill. 405; *Grenada Co. v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; *Cutler v. Board of Supervisors*, 56 Miss. 115. But in *Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710, the United States Court following *People v. Chicago*, 51 Ill. 17, held the *contra*. In *Elmwood v. Marcy* there was a dissenting opinion, holding the rule to be as declared in *Cowgill v. Long*, 15 Ill. 202, and

*Keithsburg v. Frick*, 34 Ill. 405.

In *Marshall v. Silliman*, 61 Ill. 218, where an election and vote to subscribe to railroad stock was irregular and void, it was held that the legislature could not by a curative act pass a law rendering the election and subscription valid. The legislature being prohibited by the constitution from creating a debt against a municipal corporation for municipal purposes, without its consent.

See also, *Wiley v. Silliman*, 62 Ill. 170.

7. 120 U. S. 759, 764, 7 Sup. Ct. 737, 30 L. Ed. 786.

tax payer have been violated.<sup>8</sup> But where a city, without power to do so, by ordinance extended its corporate limits, a tax levied on real estate within the extended limits was adjudged illegal and void, and an act of the legislature of a remedial nature, it was held, did not make the illegal tax valid. It was said that the remedial act could apply only to cases where the city attempting to annex property had the power to annex it, but exercised it irregularly, defectively or informally, but could not apply to cases where the city had no power to annex property. The tax in this case was not void for irregularity, but because the city had no power to tax the property.<sup>9</sup>

8. *Smith v. Buffalo*, 90 Hun (N. Y.) 118, 35 N. Y. S. 635.

Held, that the legislature of California had power to legalize defective and invalid assessments of delinquent taxes, and to provide for their collection. *People v. Holladay*, 25 Cal., 300.

Defects in the levy of assessments for taxes may be cured by an act of the legislature and a new levy made. *Dill v. Roberts*, 30 Wis. 178.

9. *Atchison & Neb. Ry. Co. v. Maquilkin*, 12 Kan. 301.

## CHAPTER 17.

## PENALTIES OF MUNICIPAL ORDINANCES.

Sec.	Sec.
710. Power to enforce ordinances by penalties.	717. Penalty must be certain.
711. Charter method of enforcing ordinances exclusive.	718. Same—New Jersey doctrine.
712. Power to inflict penalty of forfeiture.	719. Same—North Carolina doctrine.
713. Same—proceedings.	720. Penalty must be reasonable—limit.
714. Same—animals running at large.	721. Limit of fine—continuous or separate offense.
715. Penalty by imprisonment.	722. Same subject.
716. Other penalties—costs.	723. Heavier penalty for second offense authorized.

## § 710. Power to enforce ordinances by penalties.

Power to enforce ordinances or by-laws by penalties, as by fine or imprisonment, or both, and sometimes by forfeiture, is usually expressly conferred by charter, either in general or specific terms.<sup>1</sup> As stated in a Ver-

1. Power to impose penalty is necessary.

*Colorado.* Denver City R. R. Co. v. Denver, 21 Colo. 350, 29 L. R. A. 608, 52 Am. St. Rep. 239, 41 Pac. 826.

*Georgia.* Calhoun v. Little, 106 Ga. 336, 71 Am. St. Rep. 254, 43 L. R. A. 630, 32 S. E. 86; Carr v. Conyers, 84 Ga. 287, 20 Am. St. Rep. 357, 10 S. E. 630.

*Kansas.* Leavenworth v. Booth, 10 Kan. 627; Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 288.

*Louisiana.* State v. O'Neil, 49 La. Ann. 1171, 22 So. 352; State v. Boneil, 42 La. Ann. 1110, 21 Am. St. Rep. 413, 8 So. 298; Shreveport v. P. Draiss & Co., 111 La. 511, 35 So. 727; State v. Bright, 38 La. Ann. 1, 58 Am. Rep. 155.

*Michigan.* People v. Detroit Citizens, etc. R. R. Co., 116 Mich. 132, 74 N. W. 520, 4 Det. Leg. N. 1198.

*Nebraska.* In re Langston, 55 Neb. 310, 75 N. W. 828.

*New York.* In re O'Keefe, 19 N. Y. S. 676.

mont case, "since an ordinance without a penalty would be nugatory,"<sup>2</sup> the general doctrine uniformly prevails that, a municipal corporation which has power to pass the ordinance has, as a necessary incident thereto, implied power to provide for its enforcement by appro-

*Oregon.* Ah Hoy v. Spencer, 23 Ore. 89, 31 Pac. 220.

*Pennsylvania.* Pittsburg v. Young, 3 Watts 363; In re Yard, 48 Leg. Int. 228.

*Tennessee.* O'Haver v. Montgomery, 120 Tenn. 448, 111 S. W. 449, 127 Am. St. Rep. 1014.

*Virginia.* Bolton v. Vellines, 94 Va. 393, 64 Am. St. Rep. 737, 26 S. E. 847.

*England.* Rex v. Newdigate, Comb. 10; Willcock, Mun. Corp. 180.

Under the Municipal Corporation Act, 1882, in passing byelaws the council may "appoint such fines, not exceeding in any case five pounds as they deem necessary for the prevention and suppression of offenses against the same." 45 and 46 Vict. c. 50, § 23. Such penalties are recoverable summarily.

Nuisance byelaws may also impose a further penalty for a continuing offense, and they must be so framed "as to allow of the recovery of any sum less than the full amount of the penalty." English Public Health Act, 1875.

A by-law may fix a certain sum with power of mitigation. Piper v. Chappell, 14 M. & W. 624.

Right of individuals to prosecute, see Badcock v. Sankay, 54 J. P. 564; Crabtree v. Bulman, 60 J. P. 489; Jobson v. Henderson, 64 J. P. 425.

2. Winooski v. Gokey, 49 Vt. 282, 286.

**Penalty is necessary.** "It is an appropriate legal sanction which gives vitality and force to the ordinance and renders the prohibited act unlawful." State (Tomlin) v. Cape May, 63 N. J. L. 429, 44 Atl. 209; Massinger v. Millville, 63 N. J. L. 123, 43 Atl. 443; Smith v. Clinton, 53 N. J. L. 329, 21 Atl. 304; Smith v. Gouldy, 58 N. J. L. 562, 34 Atl. 748; Haynes v. Cape May, 52 N. J. L. 180, 19 Atl. 176; State v. Cleveland, 3 R. I. 117.

"An ordinance would be a dead letter if the corporation were left without any power to enforce its observance." Tipton v. Norman, 72 Mo. 380, 385.

It is no offense to violate or disregard a void ordinance. State v. Crenshaw, 94 N. C. 877, approving State v. Bean, 91 N. C. 554.

An ordinance forbidding the emission of black or thick gray smoke, etc., without any penalty attached is a mere declaration of opinion of the municipal authorities, binding on no one. Pittsburg v. W. H. Keech Co., 21 Pa. Super. Ct. 548.

Ordinance limiting speed of trains, held not ineffective because no penalty was prescribed. Chicago & E. I. R. Co. v. Hines, 82 Ill. App. 438.



priate and reasonable fines against those who break it.<sup>3</sup> Thus the power to require all able-bodied male inhabitants to work the streets in such manner as, by ordinance may be prescribed, implies power to enforce such ordinance by the imposition of penalties for failure to discharge the duty prescribed.<sup>3a</sup>

Ordinarily, municipal charters confer, either by general or particular enumeration, powers upon the local corporation in order to enable it to fulfill its functions as a municipal government. Authority to enact ordinances, to carry into effect the powers granted, is frequently expressed by the use of general terms. Thus general charter power to enact ordinances, etc., and particular power to open, widen, establish, grade and otherwise improve and keep in repair streets, etc., confers power to punish by fine any person who may obstruct a public highway within the corporate limits.<sup>4</sup> So power to suppress bawdy houses carries with it by implication the power to adopt necessary and reasonable means to

3. *Alabama.* Goldsmith v. Huntsville, 120 Ala. 182, 20 So. 509; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441.

*Georgia.* Chambers v. Barnsville, 89 Ga. 739, 15 S. E. 634.

*Illinois.* Korah v. Ottawa, 32 Ill. 121, 83 Am. Dec. 255.

*Michigan.* Detroit v. Ft. Wayne, etc. R. R. Co., 95 Mich 456, 54 N. W. 958, 35 Am. St. Rep. 580.

*Missouri.* Ulrich v. St. Louis, 112 Mo. 138, 34 Am. St. Rep. 372, 20 S. W. 466; Eyerman v. Blaksley, 78 Mo. 145, 152.

*Pennsylvania.* Fisher v. Harrisburg, 2 Grant Cases (Pa.) 291, 296.

*Tennessee.* Trigally v. Memphis, 6 Coldw. (Tenn.) 382.

*Vermont.* Winooski v. Gokey, 49 Vt. 282, 286.

"The right to make laws, neces-

sarily implies the power of enforcing the law by some sanction, otherwise the power would be nugatory." Mobile v. Yuille, 3 Ala. 137, 143, 36 Am. Dec. 441.

3a. Tipton v. Norman, 72 Mo. 308, 385.

Compare Farnsworth v. Pawtucket, 13 R. I. 82, 87.

Penalty for getting on and off engines and cars, if not passengers, sustained. Bearden v. Madison, 73 Ga. 184.

Such fines must, as a general rule, be paid into the treasury of the city, town or other municipal corporation, unless the law specifically directs otherwise. People v. Sacramento, 6 Cal. 422, 425.

4. Toledo, P. & W. Ry. Co. v. Chenoa, 43 Ill. 209, 212; Hamilton v. Carthage, 24 Ill. 22.

accomplish such purpose, which includes the imposition of a fine.<sup>5</sup> So power conferred by statute to impose a license tax on merchants and to enact ordinances for the regulation and enforcement of such tax carries with it the power to impose penalties upon employees or other persons who assist in carrying on an unlicensed business.<sup>6</sup> So charter power to pass an ordinance requiring a street railway company to sell car tickets implies the power to enforce such ordinances by fine.<sup>7</sup>

The general rule applied to municipal corporations is that charter power to restrain and prohibit a specific thing implies power to punish its commission.<sup>8</sup>

5. *Owensboro v. Simms*, 17 Ky. L. Rep. 1393, 34 S. W. 1085; *Shreveport v. Roos*, 35 La. Ann. 1010.

6. *Emporia v. Becker*, 76 Kan. 181, 90 Pac. 798, 12 L. R. A. (N. S.) 946; *Nashville C. & St. L. R. Co. v. Attalla*, 118 Ala. 362, 24 So. 450; *Dentler v. State*, 112 Ala. 70, 20 So. 592; *Farmington v. Rutherford*, 94 Mo. App. 328, 68 S. W. 83.

7. *Detroit v. Fort Wayne & Bell I. R. Co.*, 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. Rep. 580.

8. *Pekin v. Smelzel*, 21 Ill. 464, 468; *State v. Grimes*, 49 Minn. 443, 445, 52 N. W. 42; *Chariton v. Barber*, 54 Iowa 360, 6 N. W. 528.

**Power to impose penalty illustrated.** Authority to prevent authorizes a penal provision. *Centerville v. Miller*, 57 Iowa 56, 10 N. W. 293, questioning *Mt. Pleasant v. Breeze*, 11 Iowa 399, which holds that power to suppress gambling does not authorize an ordinance providing for punishment. Compare *New Hampton v. Conroy*, 56 Iowa 498, 9 N. W. 417.

Power to abate nuisances may not support a penalty for the maintenance of one. The punishment is by indictment under the statute. Where the statute makes a thing an offense, it appears in Iowa an ordinance cannot deal with the subject under general grant of power. *Nevada v. Hutchins*, 59 Iowa 506, 13 N. W. 634; approved in *Knoxville v. Chicago, etc. R. R. Co.*, 83 Iowa 636, 638, 50 N. W. 61.

See ch. 25 *post*.

An ordinance declaring the exhibiting of stallions in the public streets a nuisance and prescribing a fine for a violation thereof is within the power conferred by charter authorizing the council to prevent nuisances in public places. *State v. Iams*, 78 Neb. 678, 11 L. R. A. (N. S.) 736, 111 N. W. 604; *Nolin v. Franklin* (Tenn., 1833), 4 Yerg. 163.

**Terms of grant limits power to impose.** Authority "to prohibit and suppress all gambling houses" held not to give power to prescribe punishment by ordinance. *Owensboro v. Sparks*, 18 Ky. L.

The penalty may be prescribed in a different section from that defining the offense.<sup>9</sup> The fact that part of the penalty is void does not invalidate the legal parts.<sup>10</sup>

### § 711. Charter method of enforcing ordinances exclusive.

The rule respecting enumerated powers has often been applied to penal provisions. Hence, where the charter specifically enumerates the various acts for which penalties may be imposed, such enumeration, by implication, excludes the right to impose penalties not named.<sup>11</sup>

In accordance with the general doctrine that where a power is conferred upon a municipal corporation, to be exercised in a manner particularly described, as heretofore explained,<sup>12</sup> it follows that where the charter or law applicable provides the manner in which the local laws or ordinances are to be enforced, such provision is to be construed as excluding any other manner. The remedy of enforcement prescribed operates as a negative on any

Rep. 269, 36 S. W. 4; distinguishing *Owensboro v. Simms*, 17 Ky. L. Rep. 1393, 34 S. W. 1085.

Denied as to nuisance. *Knoxville v. Chicago*, *Burlington & Q. R. R.*, 83 Iowa 636, 32 Am. St. Rep. 321, 50 N. W. 61.

Denied for non-payment of license. *State v. Mannessier*, 32 La. Ann. 1308. Strict construction of grant. *State v. Patamia*, 34 La. Ann. 750.

Grant should be in express terms. *Burlington v. Kellar*, 18 Iowa 59, 65; *State v. Lochte*, 45 La. Ann. 1405, 14 So. 215; *State v. Dright*, 38 La. Ann. 1.

Power to impose a fine for non-payment of inspection fee does not usually arise from general grant in the general welfare

clause. *Springfield v. Starke*, 93 Mo. App. 70.

9. *Brown v. Toledo*, 7 Ohio N. P. 435, 5 Ohio S. & C. P. Dec. 210.

10. *Coden v. Gettysburg*, 8 Leg. Gaz. (Pa.) 167.

11. *Grand Rapids v. Hughes*, 15 Mich. 54, 58, per Cooley, J.; *Sibley v. Lastrico*, 122 Iowa 211, 97 N. W. 274.

The maxim *expressio unius exclusio alterius* applied and the doctrine exhaustively discussed by Sawyer, J., in *State v. Ferguson*, 53 N. H. 424, 427 *et seq.*

As to power to levy license tax on business, etc., not named, see chapter on license tax and ordinances relating thereto, *post*.

12. § 371 *et seq. ante*.

other manner.<sup>13</sup> Thus power to make by-laws, to restrain animals from running at large, and enforce such by-laws by appropriate penalties, does not give authority to provide for the impounding and sale of animals found running at large in violation of the by-law.<sup>14</sup> This rule is well illustrated in a leading English case determined in 1786, the doctrine of which prevails in the courts of this country.<sup>15</sup> The particular charter prescribed in what manner by-laws should be enforced, namely, by fine or amercement. Under such grant of power Mr. Justice Buller held that the local corporation was precluded by the act from inflicting any other punishment, as by forfeiture of property, which was attempted.<sup>16</sup>

13. "When a corporation is empowered to enforce its ordinance by fine or in any other prescribed manner, it is by implication precluded from adopting any other method of punishing disobedience to them." *Hart v. Albany*, 9 Wend. (N. Y.) 571, 598, 24 Am. Dec. 165.

14. *Miles v. Chamberlain*, 17 Wis. 446.

15. Statement of Judge Dillon, 2 Dill. Mun. Corp. (5th Ed.), § 611.

16. *Kirk v. Nowell*, 1 Term Rep. 118, 124; *Bolte v. New Orleans*, 10 La. Ann. 321.

Penalties can only be enacted and applied as directed by charter or statute. *Burlington v. Kellar*, 18 Iowa 59, 65; *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124; *Re McCutcheon and City of Toronto*, 22 Up. Can. Q. B. 613; *Re McLeod and Town of Kincardine*, 38 Up. Can. Q. B. 617; *Re Snell and Town of Belleville*, 30 Up. Can. Q. B. 81; *Re Clark and Tp. of Howard*, 10 Up. Can. Com. Pleas 576.

An ordinance imposing a tax of one dollar on persons retailing oysters on any water craft or on the levee, and in case of non-payment to be subject to a fine, is illegal, as assessing a penalty for the non-payment of the tax. *Municipality No. 1 v. Pance*, 6 La. Ann. 515.

Sometimes the municipal corporations have not the power to punish by fine and imprisonment the non-payment of licenses on trades and occupations. *State v. Mannessier*, 32 La. Ann. 1308.

A violation of an ordinance can only be proceeded against as the law prescribes. *Jefferson Police Jury v. Arleons*, 34 La. Ann. 646.

Under a charter providing that violations of ordinance may be punished either by fine or imprisonment, an ordinance prescribing the punishment for selling liquor on Sunday by fine or imprisonment or both is void and hence a conviction thereunder sentencing an accused to both a fine and imprisonment is void. *State v. New Brunswick*, 2 N. J. L. 240.

## § 712. Power to inflict penalty of forfeiture.

The chief question discussed in the English case mentioned in the last section was, whether a corporation which possessed a general power of making by-laws could make a by-law creating a forfeiture. Lord Mansfield held that no corporation possessed such extraordinary power, unless it was expressly given; it being against *Magna Charta*; and Mr. Justice Buller also said that, considering it a by-law creating a forfeiture, the act of Parliament not having given this corporation a power to make such a by-law, it was bad on that ground.<sup>17</sup>

Following this early English rule, the courts of this country have generally held that, in the absence of express power given by charter or state law applicable, ordinances or by-laws of a municipal corporation cannot be enforced by forfeiture of property of the offender.<sup>18</sup> Thus an ordinance, providing that baskets used for the sale of fruit and vegetables shall be marked and stamped in a particular manner, or they shall be forfeited with their contents, is void, where enacted in pursuance of power to impose fines or penalties or pecuniary forfeitures, which latter are simply penalties.<sup>19</sup> So an ordinance merely authorizing the arrest and punishment of

17. *Kirk v. Nowell*, 1 Term Rep. 118, 124; *Adley v. Reeves*, 2 M. & S. 60; *Player v. Archer*, 2 Sid. 121; *Clark v. Tucker*, 2 Vent. 183; *Willcock, Mun. Corp.*, 179, 180, 2 Kyd on Corp. 110; *Angell and Ames, Corp.*, 200; *Grant, Corp.*, 84.

18. *Alabama*. *Mobile v. Yuille*, 3 Ala. 137, 144, 36 Am. Dec. 441.

*Iowa*. *New Hampton v. Conroy*, 56 Iowa 498, 9 N. W. 417; *Henke v. McCord*, 55 Iowa 378, 7 N. W. 623.

*Kentucky*. *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Varden v. Mount*, 78 Ky. 86.

*Missouri*. *Taylor v. Carondelet*, 22 Mo. 105.

*New Jersey*. *White v. Tallman*, 26 N. J. L. 67; *Bergen v. Clarkson*, 6 N. J. L. 352.

*New York*. *New York v. Ordre-nau*, 12 Johns. (N. Y.) 122.

*Pennsylvania*. *Kneedler v. Norristown*, 100 Pa. St. 368, 45 Am. Rep. 383; *Barter v. Commonwealth*, 3 Pa. 253, 259, per Gibson, C. J.

19. *Phillips v. Allen*, 41 Pa. St. 481, 82 Am. Dec. 486, citing 2 Kyd on Corp., 110, and *Grant on Corp.*, 84.

any person keeping or visiting an establishment for the purpose of gambling does not authorize the seizure and detention of instruments used for gaming.<sup>20</sup>

It was early held in South Carolina that an ordinance cannot provide for the forfeiture of licenses as a penalty unless the power is expressly conferred upon the local corporation; that a license duly issued is property, and hence, under the power to impose fines, the authority of forfeiture cannot be exercised.<sup>21</sup> However, it has been held subsequently by other courts that a license may be revoked as a penalty, since such revocation does not constitute a technical forfeiture of property.<sup>22</sup> Where a license is regarded as a mere permit and not a contract, it may be terminated by a repeal of the law under which it was granted.<sup>23</sup>

In Colorado, an ordinance providing that upon a second conviction for the offense of keeping a dramshop

20. *Ridgeway v. West*, 60 Ind. 371, 376.

21. *State ex rel. v. Columbia*, 6 Rich. Law (S. C.) 404, 412, per Frost, J.

Where no power is delegated to a municipal corporation authorizing it to forbid the sale of intoxicating liquors, it cannot issue licenses to liquor dealers subject to forfeiture. *Shreveport v. P. Draiss & Co.*, 111 La. 511, 35 So. 727.

22. *Hurber v. Baugh*, 43 Iowa 514, disapproving *State ex rel. v. Columbia*, 6 Rich. Law (S. C.) 404, 412.

23. *Fell v. State*, 42 Md. 71, 89, 20 Am. Rep. 83; *Parkinson v. State*, 14 Md. 185; *State ex rel. v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *State v. Cooke*, 24 Minn. 247.

A municipal occupation tax is not a contract within the protec-

tion of the state or federal constitution. Under the police power a municipality may prohibit the occupation during the term for which it was licensed. But whether it may not then be under a duty to return the license fee is left an open question. *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878.

Although a license is a privilege, yet it is equivalent to a contract right to the extent that it cannot be abrogated at any time without sufficient cause. *State ex rel. v. Baker*, 32 Mo. App. 98; *Hannibal v. Guyott*, 18 Mo. 515; *McElhany v. McHenry*, 26 Mo. 174.

The ordinance may enforce the penalty of forfeiture for violating ordinances exacting licenses, etc. *St. Louis v. Sternberg*, 69 Mo. 289; *St. Louis v. Green*, 70 Mo. 562.

open at times forbidden, the license and the money paid therefor shall be forfeited and remain forfeited, though upon appeal and trial *de novo* an acquittal takes place, was held to be so oppressive and unreasonable as to be void in this respect.<sup>24</sup>

### § 713. Same—proceedings.

Where the power to declare a forfeiture exists, the courts generally enforce the rule of due notice and legal inquiry.<sup>25</sup> Laws authorizing the divestiture of title of property by summary proceedings must be strictly pursued. The citizen may only be deprived of his property in accordance with law, and to do otherwise would not

24. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.

Compare *State v. Anderson*, 63 Minn. 208, 65 N. W. 265; *State (Staates) v. Washington*, 45 N. J. L. 318.

25. *Illinois*. *Poppen v. Holmes*, 44 Ill. 360; *Bullock v. Geomble*, 45 Ill. 218; *Willis v. Legris*, 45 Ill. 289.

*Indiana*. *Slessman v. Crozier*, 80 Ind. 487, 489.

*Iowa*. *Gosselink v. Campbell*, 4 Iowa 296.

*Kentucky*. *Varden v. Mount*, 78 Ky. 86.

*Louisiana*. *Rost v. New Orleans*, 15 La. 129, approving *Lanfear v. New Orleans*, 4 La. 97.

*Ohio*. *Cotter v. Doty*, 5 Ohio 393, 398; *Rosebaugh v. Saffin*, 10 Ohio 31.

*Wisconsin*. Compare *Wilcox v. Hemming*, 53 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

**Forfeiture.** An ordinance authorizing a sale, under orders of the mayor, of property which is suffered to remain on the levee for a longer period than the police

regulations of the city permit, held void. Here it was said that the power conferred by the ordinance "makes the corporation judges and parties in the same cause and enables them to enforce a forfeiture and divest the owner of his property without trial in due course of law." It was declared that such power could not be conferred constitutionally. In the judgment of the court, the authority exercised in removing nuisances was "widely different," for such power is shared by the city in common with individuals, arises from necessity, and ceases with that necessity. *Lanfear v. New Orleans*, 4 La. 97, 98.

Under power "to regulate everything which relates to bakers," an ordinance which provided for seizing, by officers, of bread unstamped or deficient in weight, and conducting the offender before the court, and in event of conviction, a forfeiture of the bread seized might be ordered, was held valid. *Guillotte v. New Orleans*, 12 La. Ann. 432.

only be unjust, but despotic. Hence, courts are rigid in requiring strict compliance with laws allowing such procedure.<sup>26</sup>

### § 714. Same—animals running at large.

Without express authority,\* municipal corporations cannot provide in their ordinances for the forfeiture of animals found running at large, in violation of such ordinances. The power to impose penalties for infraction of such police regulations does not include the power to impound and sell.<sup>27</sup> In Georgia it has been held that general power over the subject, conferred authority on the local corporation to enact an ordinance requiring that stray cattle found within the corporate limits be impounded, and after being advertised for five days, sold, unless the owner should claim them and pay the charges.<sup>28</sup> Similar ordinances have been sustained when

26. *Clark v. Lewis*, 35 Ill. 417, 421; *Poppen v. Holmes*, 44 Ill. 360; *Bullock v. Geomble*, 45 Ill. 218; *Rex v. Croke*, 1 Cowp. 26.

Trial and hearing necessary.

*Mississippi*. *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143.

*Missouri*. *Johnson v. Dow*, 53 Mo. App. 372.

*Ohio*. *Rosebaugh v. Saffin*, 10 Ohio 31.

*West Virginia*. *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 337, 13 S. E. 1012.

27. *Miles v. Chamberlain*, 17 Wis. 446.

Such ordinances contravene the constitutional provisions that no person can be deprived of property without due course of law, and the right of trial by jury shall

remain inviolate. *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143, approving *Fisher v. McGirr*, 1 Gray (Mass.) 1, per *Shaw, C. J.*; *White v. Tallman*, 26 N. J. L. 67; *Darst v. People*, 51 Ill. 286; *Willis v. Legris*, 45 Ill. 289; *Poppen v. Holmes*, 44 Ill. 360.

28. *Cartersville v. Lanham*, 67 Ga. 753.

Same as to seizing and impounding hogs. *Crum v. Bray*, 121 Ga. 709, 49 S. E. 868, following the last case cited.

An ordinance providing for the selling of animals found running at large which denies the right of appeal, guaranteed by the municipal charter, of course, is void. *Shaw v. Kennedy*, 4 N. C. 591.



passed under express charter power to impose such forfeiture.<sup>29</sup>

An ordinance providing for a notice of sale and the payment of the proceeds thereof to the owner of the animal, after deducting the costs of the proceedings, was held, in Colorado, not to be a forfeiture of animals.<sup>30</sup>

29. *Alabama*. Folmar v. Curtis, 86 Ala. 354, 5 So. 678.

*Arkansas*. Fort Smith v. Dodson, 46 Ark. 296.

*Connecticut*. Whitlock v. West, 26 Conn. 406.

*Illinois*. Friday v. Floyd, 63 Ill. 50.

*Kansas*. Gilchrist v. Schmidling, 12 Kan. 263, followed in Crum v. Bray, 121 Ga. 709, 712-714, 49 S. E. 868.

*Kentucky*. Armstrong v. Brown, 20 Ky. L. Rep. 1766, 50 S. W. 17.

*Michigan*. Grover v. Huckins, 26 Mich. 476, per Cooley, J.; Campau v. Langley, 39 Mich. 451.

*Missouri*. Howlett v. Erie, 79 Mo. App. 656; Shy v. Richards, 79 Mo. App. 661.

*North Carolina*. Rose v. Hardie, 98 N. C. 44, 4 S. E. 41, approving Hellen v. Noe, 3 Ired. (N. C.) 493; Whitfield v. Longest, 6 Ired. (N. C.) 268.

*South Carolina*. Crosby v. Warren, 1 Rich. (S. C.) Law 385, distinguishing Kennedy v. Sowden, 1 McMullen Law (S. C.) 323.

*Tennessee*. Knoxville v. King, 7 Lea (75 Tenn.) 441; Moore v. State, 11 Lea (79 Tenn.) 35.

*Texas*. See Waco v. Powell, 32 Tex. 258.

*Wisconsin*. Wilcox v. Hemming, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435.

30. Brophy v. Hyatt, 10 Colo. 223, 227, 15 Pac. 399.

Similar ruling in Iowa. Gosselink v. Campbell, 4 Iowa 296.

What constitutes running at large. Escape of horses from an enclosure against the will of the owner who immediately goes in search of them, is not a running at large. "There must be some guilty intention or wilful neglect before a party can be made liable to the penalties imposed by the ordinance. He must permit or suffer his stock to run at large." Kinder v. Gillespie, 63 Ill. 88, 89.

"The knowledge and sufferance is the gist of the offense. The penalty is not to be enforced because the hogs were running at large but because the owner suffered them to run at large." Case v. Hall, 21 Ill. 632, 636, per Breese, J.

So the ordinance does not apply where the escape of the hogs was unavoidable—as a flood—and the owner uses due diligence in attempting to reclaim them. Spittler v. Young, 63 Mo. 52, per Wagner, J.

Power to kill dogs. Stebbins v. Mayer, 38 Kan. 573, 16 Pac. 745; People v. Police Board, 24 How. Pr. (N. Y.) 481, 15 Abb. Pr. (N. Y.) 167.

An ordinance authorizing the killing of dogs for failure of owner to pay the dog taxes is valid. Mowery v. Salisbury, 82 N. C. 175.

See ch. 24 *post*.

Ordinarily, courts of equity have no power to relieve against the valid forfeiture of property in pursuance of municipal ordinances.<sup>31</sup>

### § 715. Penalty by imprisonment.

Unless the power is expressly conferred, a municipal corporation cannot inflict the penalty by imprisonment of the offender, either in the first instance or for non-payment of a fine duly imposed for violation of its ordinance.<sup>32</sup> Thus power to impose a sentence to "hard labor on the streets," does not authorize imprisonment.<sup>33</sup>

31. Relief in equity against forfeiture. In *Taylor v. Carondelet*, 22 Mo. 105, 112, where a forfeiture of a lease was involved, it was said that "in giving the corporation powers on the subject of leases the general assembly must have necessarily intended that its ordinances should operate as laws and not as contracts."

The state may by subsequent law release a penalty incurred under former law. *Maryland v. Baltimore & O. R. R. Co.*, 3 How. (44 U. S.) 534, 11 L. Ed. 714.

32. *Ex parte Moore*, 62 Ala. 471; *Ex parte Slaterry*, 3 Ark. 484; *Kinmundy v. Mahan*, 72 Ill. 462; *State ex rel. v. Baton Rouge*, 40 La. Ann. 209, 3 So. 541; *Willcock, Mun. Corp.* 181; *Clark's Case*, 5 Co. 64; *Bab v. Clerk*, *Moore*, 411; *London v. Wood*, 12 Mod. 686.

**Penalty by imprisonment.** Power to punish by fine or imprisonment does not include authority to coerce the payment of fine by imprisonment. "When the punishment inflicted is imprisonment, that is the penalty to be enforced.

When the penalty is a fine, that is the penalty to be enforced in the manner provided by law." *Brieswick v. Brunswick*, 51 Ga. 639, 642, 21 Am. Rep. 240; *S. P. Bregguglia v. Vineland*, 53 N. J. L. 168, 11 L. R. A. 407, 20 Atl. 1082.

A fine assessed may be collected either by commitment of the person upon whom the fine is imposed or by *feri facias*. *Huddleson v. Ruffin*, 6 Ohio St. 604.

Charter power to enforce ordinances "by a proper fine, imprisonment or other penalty" does not permit the infliction of both fine and imprisonment as substantive punishment for the same offense. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.

Under an ordinance permitting imprisonment only, in event there is no appeal, if upon conviction an appeal is taken, the defendant cannot be imprisoned. *Carson v. Bloomington*, 6 Ill. App. 481.

33. Ordering the defendant into official custody until the fine and costs duly imposed are paid is imprisonment. *Ex parte Moore*, 62 Ala. 471, 475.

Such imprisonment is not in satisfaction of judgment, but merely a means of enforcing its payment. Therefore it constitutes no defense to an action of *scire facias* against the sureties on the appeal bond of the offender, to recover the amount of such judgment and costs.<sup>34</sup>

Generally, charters confer the power to imprison in express terms.<sup>35</sup> The penalty of imprisonment imposed by charter for violation of an ordinance is not a debt within the constitutional provision forbidding imprisonment for debt.<sup>36</sup>

The enforcement of ordinances by imprisonment depends upon the provisions of the particular charter. Usually it may only be exercised after trial and hearing.<sup>37</sup> And the judgment, sentence, or order of commitment is controlled by the law conferring the power to impose.<sup>38</sup> Thus where the council is vested with the

34. *Sheffield v. O'Day*, 7 Ill. App. 339.

35. *Ex parte Green*, 94 Cal. 387, 29 Pac. 783, distinguishing *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *Ex parte Chin Yan*, 60 Cal. 78; *Ex parte Ellis*, 54 Cal. 204; *Ex parte Bollig*, 31 Ill. 88; *Flora v. Sachs*, 64 Ind. 155; *Miltonvale v. Lanoue*, 35 Kan. 603, 12 Pac. 12.

36. *Chicago v. Kenney*, 35 Ill. App. 57; *Hardenbrook v. Lingonier*, 95 Ind. 70; *Ex parte Hollwedell*, 74 Mo. 395; *St. Louis v. Sternberg*, 69 Mo. 289; *Canton v. Ligon*, 71 Mo. App. 407; *Ex parte Kiburg*, 10 Mo. App. 442.

And this is true, although there be a general law of the state imposing a fine for a like offense. *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *Independence v. Moore*, 32 Mo. 392; *State v. Wister*, 62 Mo. 592; *State v.*

*Harper*, 58 Mo. 530; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457.

See chapter 25 *post*.

37. **Power to inflict Imprisonment** must be expressly conferred. *Ex parte Montgomery*, 64 Ala. 463; *Ex parte Burnett*, 30 Ala. 461; *Ex parte Green*, 94 Cal. 387, 29 Pac. 783; *Burlington v. Kellar*, 18 Iowa 59, 65; *State v. Ruff*, 30 La. Ann. 497; *Barter v. Commonwealth*, 3 Pa. 253; *Low v. Evans*, 16 Ind. 486.

38. **Imprisonment is limited by controlling law.** Where the law limits imprisonment to six months, an order that defendant be imprisoned and remain until such time as would make the amount of such debt \$1.50 per day when he should be discharged, is void. *Kanouse v. Lexington*, 12 Ill. App. 318.

Provision that offender, on conviction, shall be fined not exceeding \$500, and may be imprisoned

exclusive power to make direction respecting the duration of imprisonment of violators of ordinances, failure on its part to do so will not authorize the trial court to fix such time in the judgment or sentence.<sup>39</sup> So under a charter authorizing sentence to "hard labor on the streets \* \* \* not exceeding thirty days," a sentence directing the marshal to take the offender "into custody and detain him until the fine and costs are fully paid," is void, because (1) it imposes "imprisonment," whereas the charter provides "hard labor," and (2) is indefinite in duration, whereas the limit prescribed is thirty days.<sup>40</sup>

The duration of imprisonment cannot exceed the charter limit.<sup>41</sup> But an ordinance providing for a term of imprisonment which might exceed that authorized by the State Constitution, but does not necessarily do so, is not void and may be enforced within the constitutional limit.<sup>42</sup> Imprisonment for twenty-one hundred and sixty days in default of payment of fines aggregating seven hundred and twenty dollars on conviction of seventy-two

for a period not exceeding sixty days, or both, does not authorize a sentence "to pay a fine of \$100 or perform sixty days' work on the public streets" of the city. The sentence is void for uncertainty, being in the alternative. *Ex parte Martini*, 23 Fla. 343, 2 So. 689.

Under charter authority to inflict punishment by fine not to exceed \$100, or in default of the payment of the same by labor on the streets, an ordinance providing a fine specifying the amount of imprisonment is invalid since it allows imprisonment without first giving the offender an opportunity to pay the fine. *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254, 43 L. R. A. 630, 32 S. E. 86.

Compare *Papworth v. Fitzgerald*, 106 Ga. 378, 32 S. E. 363.

Where the charter authorizes imprisonment in the county jail only, a commitment to the county penitentiary is void. *Merkee v. Rochester*, 13 Hun (N. Y.) 157.

39. *Merkee v. Rochester*, 13 Hun (N. Y.) 157.

40. *Ex parte Moore*, 62 Ala. 471, 475.

41. *Brown v. Asbury Park*, 44 N. J. L. 162; *Keokuk v. Dressell*, 47 Iowa 597; *Ex parte Moore*, 62 Ala. 471, 475; *New Orleans v. Costello*, 14 La. Ann. 37; *State ex rel. v. Bringier*, 42 La. Ann. 1095, 8 So. 298; *State v. Boneil*, 42 La. Ann. 1110, 21 Am. St. Rep. 413, 10 L. R. A. 60, 8 So. 298.

42. *Keokuk v. Dressell*, 47 Iowa 597.

distinct violations of one ordinance within one hour and forty minutes is unusual and unreasonable punishment.<sup>43</sup>

### § 716. Other penalties—costs.

In accordance with the rule heretofore stated that the charter method of enforcing ordinances is exclusive<sup>43a</sup> charter power to commit to the city prison, work house, or place of correction, does not authorize a sentence to perform labor on the public streets.<sup>44</sup> So a fine for violating an ordinance and a simple judgment of imprisonment until the fine and costs are paid, cannot be enforced by compelling the defendant to perform manual labor on the streets.<sup>45</sup> But under express charter power, hard labor may be inflicted as a punishment.<sup>46</sup>

43. *State ex rel. v. Whitaker*, 48 La. Ann. 527, 35 L. R. A. 561, 19 So. 457.

Where under the law one imprisoned could be discharged on the payment of fine and costs one in custody does not entitle himself to a release by merely tendering sufficient property upon which to levy the execution. In *re Miller*, 44 Mo. App. 125.

See § 720, *post*.

43a. § 711 *ante*.

44. *Ex parte Martini*, 23 Fla. 343, 2 So. 689.

Where an ordinance imposes a penalty, unless special modes are prescribed, the sums must be collected by a civil action. *People v. Sloan*, 90 N. Y. S. 762, 98 App. Div. 450.

Violation of ordinance imposing a penalty therefor is not a misdemeanor. Recovery of the penalty is by civil action under the ordinance. *C. Beck Co. v. Milwaukee*, 139 Wis. 340, 120 N. W. 293.

45. *Torbert v. Lynch*, 67 Ind. 474.

Sentence to chain gang is void without express charter power. *Carr v. Conyers*, 84 Ga. 287, 20' Am. St. Rep. 357, 10 S. E. 630.

46. *Keokuk v. Dressell*, 47 Iowa 597; *Ex parte Montgomery*; 64 Ala. 463.

But power to impose must be expressly given. *Ex parte Reynolds*, 87 Ala. 138, 6 So. 335.

**Hard labor as punishment.** Under charter power to provide that those committed to jail shall be required to work at such labor as their strength permits, an ordinance imposing imprisonment at hard labor is unauthorized. *Lead v. Klatt*, 13 S. D. 140, 82 N. W. 391.

A charter provision authorizing the imprisonment of violators of city ordinances in the county chain gang, along with persons convicted of violations of the state laws is unconstitutional.

In the opinion of the Supreme Court of Michigan, hard labor, in itself, is not infamous or degrading; on the contrary, it is ennobling and is the foundation upon which reposes all true progress in mental and moral development. "The infamy and degradation consists in its being involuntary. The distinction is the difference between liberty and slavery."<sup>47</sup>

Without express provision, costs of the proceedings form no part of the penalty.<sup>48</sup> Costs were unknown to the common law, and the power to impose must be found in the charter or legislative act applicable or it does not exist.<sup>49</sup> Thus where the charter authorizes the penalty, fine and imprisonment, an ordinance adding "costs of the prosecution" is void as to such clause.<sup>50</sup>

Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751.

An ordinance imposing labor penalties is not in violation of the federal Constitution forbidding involuntary servitude except as a punishment for crime. *Stone v. Paducah*, 120 Ky. 322, 27 Ky. L. Rep. 717, 86 S. W. 531; *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751.

47. Per Champlin, J., in *People v. Hanrahan*, 75 Mich. 611, 621, 42 N. W. 1124, quoting:

"An angel's wing would droop if long at rest,  
And God himself, inactive, were no longer blest."

Disfranchisement cannot be inflicted as a punishment. *Willcock*, Mun. Corp.; *Rex v. London*, 2 Lev. 201.

Corporal punishment denied. *Ex parte Deane*, 2 Cranch C. C. 125, 7 Fed. Cas. No. 3,712.

The clipping of the hair of the

offender is unreasonable punishment. *Ho Ah Kow v. Nunan*, 5 Sawyer 552, 12 Fed. Cas. No. 6,546.

See § 748 *post*.

48. *Bayonne v. Herdt*, 40 N. J. L. 264.

49. *State v. Kinne*, 41 N. H. 238; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *Bishop*, Crim. Proc., § 1313.

50. *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458.

**Costs.** So costs in criminal cases are not within the provision. *Caldwell v. State*, 55 Ala. 133.

In the absence of express authority therefor, an ordinance which imposes a city attorney's fee in addition to the fine and costs in cases of violation of ordinances is void. *Moody v. Williamsburg*, 121 Ky. 92, 28 Ky. L. Rep. 60, 88 S. W. 1075.

### § 717. Penalty must be certain.

The fundamental rule requiring all ordinances to be precise, definite and certain in their terms <sup>50a</sup> is especially applicable to penal provisions. It is very common for penal ordinances to leave a margin to the discretion of the court so that the fine or imprisonment imposed may be graded in some proportion to the aggravation of the circumstances. Where the power exists to inflict penalties for the violation of ordinances, and the charter does not forbid, the ordinance may specify a reasonable margin. Thus it may provide that the fine shall not be less than a named sum, nor greater than a specified amount; or that the imprisonment shall not be less than a specified time, nor greater than a time named; or that the fine shall not exceed a named sum, or the imprisonment extend beyond a specified time.<sup>51</sup>

Adopting the rule of the older English authorities that by-laws would be held void for uncertainty, unless the penalties therein named were fixed at a definite amount, the Supreme Court of Alabama early held that a by-law which provided a penalty in such sum, not exceeding fifty dollars, as the corporation court might think proper to impose as a fine, was too vague to be supported.<sup>52</sup> Subsequently, this court departed from this doctrine and sustained a by-law which left the amount of the fine within fixed limits (*e. g.*, not exceeding fifty

50a. § 651 *ante*.

51. Per Lowrie, J., in *Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291, 296; *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458, relying on 1 Dill. Mun. Corp. (4 ed.), § 341.

52. "The penalty must be a certain sum, and cannot be left to the arbitrary assessment of

the corporation court, to be determined according to the nature of the offense." Fixing a limit beyond which the fine cannot extend does not remove the objection. "The reason assigned is that it permits the corporation to be a judge of its own cause." *Mobile v. Yuille*, 3 Ala. 137, 144, 36 Am. Dec. 441.

dollars) to the discretion of the court.<sup>53</sup> The courts of this country generally sustain this rule.<sup>54</sup>

### § 718. Same—New Jersey doctrine.

However, in New Jersey, where the penalty for the violation of ordinances is to be recovered by action of debt, the rule is that the ordinance must fix the precise penalty to be imposed, and where the amount is left to the discretion of the court, as that it shall not be less than ten dollars, nor more than fifty dollars, or shall not

53. *Huntsville v. Phelps*, 27 Ala. 55, overruling *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441. The court said (p. 58): "A reasonable discretion is given to be exercised within certain limits, and we can see no objection which could be urged to such a by-law, which could not, with equal propriety, be made to any by-law investing courts or juries with discretion in apportioning the fine to the offense, being restricted within reasonable bounds. The lower power of making just discrimination, so as to advance the ends of justice, and mete out to every violator of the law a punishment proportioned to its demerits, should reside somewhere; and since the charter invests the corporation with the power to pass such by-law, and to create proper sanctions, we do not conceive that the law in question is at all unreasonable, or uncertain, in that sense which renders it void." Per *Chilton*, C. J.

54. *Alliance v. Joyce*, 49 Ohio St. 7, 30 N. E. 270. Judge *Dillon* supports this doctrine as "just and reasonable," and observes that "the older English authori-

ties as far as they hold such a by-law void for uncertainty are regarded as unsound in principle, and ought not to be followed." 2 *Dillon* (5th Ed.), § 613.

The question of certainty of penalty in ordinances is fully discussed in *Re Frazee*, 63 Mich. 396, 30 N. W. 72, per *Campbell*, C. J.

Penalty of fine or imprisonment or both at the discretion of the mayor upon conviction, held unauthorized. *Appeal of Butler*, 73 Pa. St. 448.

A municipal corporation cannot direct the arrest and imprisonment of persons who refuse to pay a license fee under a law which confers upon such corporations the power to impose such license fees. *Egger v. Stine*, 12 Pa. Co. Ct. Rep. 316.

An ordinance providing for a fine in excess of that limited by law of course, is void. *McNeill v. State*, 29 Tex. App. 48, 14 S. W. 393.

Under sufficient charter power an ordinance may prescribe a penalty not defined in the state penal code. *Ayers v. Dallas*, 32 Tex. Crim. Rep. 603, 25 S. W. 631.



exceed fifty dollars, the ordinance will be held bad for uncertainty.<sup>55</sup> The doctrine is that, the charter requirement that the penalty shall be recovered by action of debt is equivalent to a declaration that the common council must prescribe a precise penalty so that the action of debt can be supported. It is argued that "an action of debt can only be maintained for a sum capable of being ascertained at the time of the action brought."<sup>56</sup>

So it has been held in New Jersey that where the power is given to enforce an ordinance or by-law by reasonable penalties which may be "imposed for revenue," the ordinance must fix the precise penalty. Here it was said that the singular provision that the penalty was to be "imposed for revenue" seems to invoke the exercise of the taxing power in conjunction with the police power and to require that the imposts should be graduated, not so much by the circumstances of the particular case, as by the needs of the municipality within reasonable bounds. "The ascertainment of the sum to be charged for the latter object is not a judicial function."<sup>56a</sup>

In one case in that state, where the charter involved did not require the penalty to be collected by action of debt, a conviction was sustained under an ordinance providing a penalty not exceeding a stated sum (e. g., fifty dollars).<sup>57</sup> And in another case it was declared that the ordinance may confer upon the magistrate the power of adjusting the penalty within the statutory limit to the circumstances of each case, unless the statute evinced an intention that the governing body of the corporation should itself fix the precise limit.<sup>58</sup>

55. *State v. Zeigler*, 32 N. J. L. 262, 269, distinguishing *Piper v. Chappell*, 14 Exch. 649; *Massinger v. Millville*, 63 N. J. L. 123, 43 Atl. 443; *White v. Tallman*, 26 N. J. L. 67; *Melich v. Washington*, 47 N. J. L. 254; *Tomlin v. Cape May*, 63 N. J. L. 429, 44 Atl. 209

56. *State (Smith) v. Clinton*, 53 N. J. L. 329, 21 Atl. 304.

56a. *Young & McShea A. Co. v. Atlantic City*, 60 N. J. L. 125, 126, 37 Atl. 444.

57. *McConvill v. Jersey City*, 39 N. J. L. 38.

58. *Young & McShea A. Co. v. Atlantic City*, 60 N. J. L. 125, 126, 37 Atl. 444.

**§ 719. Same—North Carolina doctrine.**

The doctrine that the fine for the violation of the ordinance cannot be committed to the discretion of the court is also supported by decisions in North Carolina. In that state the fines must be definitely fixed in amount; therefore, ordinances prescribing a fine of not more than a named sum, or imprisonment not to exceed a specified number of days, have been declared void for uncertainty.<sup>59</sup> And the same court held that an ordinance is not void for uncertainty by reason of a provision giving the mayor discretion to impose a fine of fifty dollars, or imprisonment for thirty days, upon conviction, where the statute makes the violation of the ordinance a misdemeanor, and the constitution of the state makes exactly the same provision as to the punishment for misdemeanors.<sup>60</sup>

**§ 720. Penalty must be reasonable—limit.**

There must be a limitation in the amount of the penalty. This may be provided either in the state statute or the charter authorizing the ordinance, or it may be in the ordinance itself, and if in the latter, the courts may determine whether the amount so fixed is reasonable. The term reasonable, as used here, means what is reasonable under the circumstances, taking into account the character of the offense. What would be a reasonable penalty cannot from the nature of things admit of a general rule applicable to all cases, but must in every case

Where the charter authorizes the penalty by fine or imprisonment, an ordinance imposing a penalty of fine or imprisonment or both, at the discretion of the magistrate, held void. *State (Leland) v. Long Branch Comrs.*, 42 N. J. L. 375, approved in *State (Staates) v. Washington*, 44 N. J. L. 605, 612.

59. *State v. Worth*, 95 N. C. 615; *State v. Crenshaw*, 94 N. C. 877; *State v. Cainan*, 94 N. C. 883; *State v. Rice*, 97 N. C. 421, 2 S. E. 180; *Commissioners of Louisville v. Harris*, 7 Jones Law (N. C.) 281.

60. *State v. Higgs*, 126 N. C. 1014, 1020, 48 L. R. A. 446, 35 S. E. 473.

be determined by the nature of the offense intended to be prohibited.<sup>61</sup>

Where the penalty prescribed is reasonable, the ordinance will not be declared unconstitutional because the charter or statute authorizing its enactment does not limit the penalty the ordinance may impose.<sup>62</sup>

In the absence of legal restriction, it has been held that the penalty may be fixed at any sum within the jurisdiction of the municipal or police court, provided it be not unreasonable in view of the nature of the offense.<sup>63</sup> Where the penalty is precisely fixed by the

61. *Mobile v. Yuille*, 3 Ala. 137, 144, 36 Am. Dec. 441; *In re Ah You*, 88 Cal. 99, 25 Pac. 974; *Austin v. Murray*, 16 Pick. (Mass.) 121; *Ex parte Bedell*, 20 Mo. App. 125; *Brown v. Toledo*, 7 Ohio N. P. 435.

Penalty in forbidding sale of liquor. *Toledo v. Edens*, 59 Iowa 352, 354, 13 N. E. 313.

**Reasonableness of penalty.** Penalty of \$15 for failure to pay license of \$10, as attorney as prescribed by ordinance, held not exorbitant. *Baker v. Lexington*, 21 Ky. L. Rep. 809, 53 S. W. 16.

A fine of \$250 for carrying concealed weapons is reasonable. *In re Cheney*, 90 Cal. 617, 27 Pac. 436.

A fine of \$50 for gambling is not excessive punishment. *Greenville v. Kemmis*, 58 S. C. 427, 50 L. R. A. 725, 36 S. E. 727.

A fine not exceeding \$1,000 or imprisonment not exceeding six months, or both, for uttering, etc., profane and obscene language and words having a tendency to create a breach of the peace, held reasonable. *In re Miller*, 89 Cal. 41, 26 Pac. 620.

2 McQ—42

A fine of \$100 or imprisonment for 90 days for failure to obtain a license by drivers of stages for the transportation of passengers, held not to be cruel and unusual punishment. *Belmar v. Barkalow*, 67 N. J. L. 504, 52 Atl. 157.

An ordinance may require omnibus drivers to carry any person offering himself as a passenger; and a fine of \$20.00 for a violation thereof is not unreasonable. *Atlantic City v. Brown*, 72 N. J. L. 207, 62 Atl. 428.

62. *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497; *Bowman v. St. John*, 43 Ill. 337; *Ashton v. Ellsworth*, 48 Ill. 299.

**Changing penalty during prosecution.** Where an ordinance is passed mitigating the penalty during the prosecution, defendant cannot complain that the penalty imposed by the original ordinance is so exorbitant as to invalidate the ordinance. *Baker v. Lexington*, 21 Ky. L. Rep. 809, 53 S. W. 16.

63. A fine beyond court's jurisdiction is void. *Zylstra v. Charleston*, 1 Bay (S. C.) 382.

organic law, of course, it cannot be exceeded by ordinance.<sup>64</sup> Thus where the law authorizes the infliction of such penalty as may be provided "for like offenses against the laws of the state," an ordinance fixing the fine for assault at from five to fifty dollars, is void, where the minimum fine for such offenses is three dollars under the state law.<sup>65</sup> If the maximum fine is within the charter limits, its reasonableness cannot be questioned.<sup>66</sup>

The decisions present some conflict respecting the question whether the penalty of the ordinance should exactly correspond with the penalty of the state statute where the unlawful act is made an offense against both the state and the local corporation. By constitution in Kentucky the penalty must not be less than that provided by state statute for the same act.<sup>67</sup> In such case, if the penalty is not limited, decisions exist to the effect that it may be greater than that provided in the state law.<sup>68</sup> However, this proposition has been denied.<sup>69</sup> The cases in the notes contain many rulings on the point.

64. *State v. Boneil*, 42 La. Ann. 1110, 8 So. 298; *Commonwealth v. Wilkins*, 121 Mass. 356; *Zylstra v. Charleston*, 1 Bay (S. C.) 382; *Leland v. Long Branch Commissioners*, 42 N. J. L. (13 Vroom) 375.

65. *Petersburg v. Metzker*, 21 Ill. 205.

Where the law prescribes a fine of not less than \$10, the imposition of a fine of only \$5 is erroneous. *Taylor v. State*, 35 Wis. 298.

**Contra.** Ordinance cannot impose a greater fine than that fixed by the charter, but may impose less. *Ex parte Caldwell*, 138 Mo. 233, 241, 39 S. W. 761.

66. *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202.

67. *Owensboro v. Sparks*, 18 Ky. L. Rep. 269, 36 S. W. 4.

68. *Deitz v. Central*, 1 Colo. 323, 327; *Pekin v. Smelzel*, 21 Ill. 464, 469; *Baldwin v. Murphy*, 82 Ill. 485, 490; *Quincy v. O'Brien*, 24 Ill. App. 591; *State v. Ludwig*, 21 Minn. 202.

69. *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; *Schroeder v. Charleston*, 3 Brev. (S. C.) 533.

**Limit of penalty.** Assault and battery, ordinance penalty cannot be greater than state law. *Petersburg v. Metzker*, 21 Ill. 205.

Ordinance penalty to be the same as that provided by statute. *State v. Chase*, 33 La. Ann. 287; *Amboy v. Sleeper*, 31 Ill. 499.

Ordinance penalty less than statute. *Robbins v. People*, 95 Ill. 175; *Rice v. State*, 3 Kan. 141, 164.

**§ 721. Limit of fine—continuous or separate offense.**

The ordinance may impose a fine not exceeding the charter limit for each separate and distinct offense.<sup>70</sup> Thus several distinct fines for separate acts, *e. g.*, of retailing liquor on different days may be imposed at one sitting of the council, notwithstanding the aggregate of the fines exceed the charter limit.<sup>71</sup>

In one case the ordinance forbade cutting down cedar and other trees, and imposed a penalty of five dollars "for each and every offense;" in one proceeding and one judgment the offender was convicted of forty different offenses and fined five dollars for each, making an aggregate of two hundred dollars—each offense being supposed to consist in each tree by him cut down. Here it was held that the matter charged amounted to no

Duration of imprisonment, see § 715, *ante*.

Charter limit \$50, ordinance from \$20 to \$100, void as to excess, but valid as to rest. *Greenfield v. Mook*, 12 Ill. App. 281.

If within charter, valid. *Ope-lousas v. Giron*, 46 La. Ann. (pt. 2) 1364, 16 So. 196.

Charter, not exceeding \$20, ordinance not less than \$3, nor exceeding \$10, inconsistent and ordinance void. *Landis v. Vineland*, 54 N. J. L. 75, 23 Atl. 357.

If penalty conflicts with general law of state it is void. *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757; *In re Ah You*, 88 Cal. 99, 25 Pac. 974.

A charter provision authorizing a greater punishment for the offense when committed within the corporate limits than that allowed by state statute for the same offense, held unconstitutional. *In re Bayard*, 61 How. Pr. (N. Y.) 294, reversed 25 Hun (N. Y.) 546.

For obstructing streets the state law prescribed a penalty not exceeding \$500. Where a town ordinance fixes the penalty not to exceed \$25, it is void as it conflicts with the state law. *Ex parte Cross*, 6 Tex. Ct. Rep. 425, 71 S. W. 289.

An ordinance may fix a penalty less than that imposed by a state law. *Carlisle v. Heckinger*, 103 Ky. 381, 45 S. W. 358; *Kansas City v. Hallett*, 59 Mo. App. 160; *St. Joseph v. Vesper*, 59 Mo. App. 459.

See chapter 24 *post*.

70. *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165.

71. *State ex rel. Heise v. Town Council of Columbia*, 6 Rich. L. (S. C.) 404.

An ordinance may prescribe a penalty of \$50 and \$100 for a repetition of the same offense though the offense is continuous in respect of time. *Belle Centre v. Welsh*, 24 Wkly. Law Bul. 176.

more than a single offense, for, as the court observed, it may well be that every tree cut down of which the offender stood convicted was cut down in one day, and under the ordinance the cutting down of more trees than one at one time would be but one offense. The court held that but one offense had been committed, and as the aggregate fines exceeded the charter limit, the conviction was void.<sup>72</sup>

In an English case, one by-law required party walls to be of a prescribed thickness, under fixed penalty, and another by-law provided that if the offense should continue the offender should be liable to a further prescribed penalty for each day during which the offense should continue, after due written notice. Defendant was fined under the first by-law and afterwards again fined under the second by-law "for continuing the offense." On appeal, it was held that suffering the party wall to remain unaltered was not a "continuing offense" within the second by-law, or, if it was, that by-law, was unreasonable—the appropriate remedy being the removal of the structure as authorized by law.<sup>73</sup>

### § 722. Same subject.

In a Massachusetts case the organic law limited the penalty to twenty-five dollars for each offense. The ordinance authorized the imposition of a penalty of not less than one dollar nor more than five dollars, for every hour that a person should keep his wagon in the market without legal permission, after notice to remove and until actual removal. Here it was said: "The offense thus punished is a single continuous offense; and the ordinance affixing a penalty which, computed according

72. *State ex rel. Truesdale v. Attalla*, 118 Ala. 362, 24 So. 450.  
*Moultrieville*, 1 Rice Law (S. C.) 158.

73. *Marshall v. Smith*, L. R., 8 C. P. 416.  
See *Nashville C. & S. L. R. Co.*

to its terms, may exceed twenty-five dollars for a single offense upon one and the same day, is void.”<sup>74</sup>

In an English case, defendant was convicted for exercising the trade of a baker on the Lord's Day and for selling hot loaves contrary to the statute, and fined for forty different sales of bread. On appeal, Lord Mansfield held that under the law but one offense for exercising his ordinary calling could be committed on the same day.<sup>75</sup>

Where the charter limit was fixed at one hundred dollars, an ordinance imposing a fine of five dollars for every barrel of flour sold in violation of the inspection regulation cannot be enforced beyond the limit. The transaction of sale was held to be but one offense, and the ordinance was construed to impose a fine of five dollars for each barrel sold in violation of its provision until the sum reaches one hundred dollars in the same sale. The court said that any other construction would invalidate the ordinance.<sup>76</sup> So where the limit was two hundred and fifty dollars fine, an ordinance providing a fine of one hundred and twenty-five dollars for every one

74. Per Gray, C. J., in *Commonwealth v. Wilkins*, 121 Mass. 356.

75. Lord Mansfield said: "The offense is exercising his ordinary trade on the Lord's Day, and, that without any fraction of the day, hours or minutes; it is but one entire offense, whether longer or shorter in point of duration, or whether it consists of one or a number of particular acts; that there was no idea conveyed by the act that if a tailor sews on the Lord's Day, every stitch he takes is a separate offense, and (he adds) there can be but one entire offense on one and the same day; killing a single hare is an offense, but the killing of ten more on the

same day will not multiply the offense, or the penalty imposed for killing one." *Crepp v. Durden*, Cowp. 640; *Marshall v. Smith*, L. R., 8 C. P. 416.

76. "This ordinance is repugnant to their charter, so far as it operates to impose a penalty beyond one hundred dollars, and is to that extent inoperative. It being a single transaction, a recovery if otherwise authorized, could only be had to the extent of one hundred dollars, and as the penalty could not be split, such a recovery would be a bar to any future proceedings for the balance." *Quincy v. Quimby*, 38 Ill. 274, 279.

one hundred pounds of gunpowder unlawfully kept in violation of its provisions, was held void; for a violation of the by-law in any one prosecution could not exceed the charter limit.<sup>77</sup>

For the offense of keeping a dramshop without a license, the ordinance cannot make each sale of liquor a separate and distinct offense.<sup>78</sup> So under an ordinance forbidding the sale and exposing for sale of certain commodities on Sundays, one single act of selling cannot be divided into two offenses, one exposing to sale and another selling.<sup>79</sup>

In one case the ordinance provided a license of fifty cents per pole per year on each electric pole within the city, required owners thereof to number and designate with initials each pole, and imposed a penalty of five dollars for each and every offense upon any person "who shall violate any of the provisions of any section thereof." It was held that a company refusing to mark and number its poles and take out a license was guilty of but one offense and liable to but one penalty; that a penalty could not be imposed for failure as to each separate pole.<sup>80</sup>

### § 723. Heavier penalty for second offense authorized.

A municipal corporation empowered to impose penalties for the violation of its ordinances, may distinguish between a first and second offense, and may provide for

77. *New York v. Ordrenan*, 12 Johns (N. Y.) 122.

78. *Eureka Springs v. O'Neal*, 56 Ark. 350, 19 S. W. 969.

79. *Brooklyn v. Toynbee*, 31 Barb. (N. Y.) 282.

80. *Lancaster v. Edison Elec-*

*tric Illuminating Co.*, 8 Pa. Co. Ct. Rep. 178.

A by-law prescribing a daily penalty for keeping a faro table can only be enforced by issuing warrants for the offense daily. *Dixon v. Washington*, 4 Cranch C. C. 114, Fed. Cas. No. 3935.



a heavier penalty for such violation subsequent to the first, provided the penalty in no case exceeds the limit fixed by the charter.<sup>81</sup>

81. The ordinance affixed two penalties, one of a general, and another and higher penalty for a second offense, but neither exceeded the charter limit. Held,

valid. *State (Staat) v. Washington*, 45 N. J. L. 318, 322.

Gradation of penalties in by-law of a trade corporation sustained. *Butcher's Co. v. Bullach*, 3 Bos. & Pul. 434.

## CHAPTER 18.

REASONABLENESS OF ORDINANCES, AND HEREIN  
ORDINANCES IN RESTRAINT OF TRADE.

Sec.	Sec.
724. Express power to pass.	731. Same subject.
725. General grant and implied or incidental powers.	732. Same subject.
726. Mode of exercise of express power must be reasonable.	733. Same—English cases—custom and usage.
727. Same—illustrative cases.	734. Same—illustrative cases.
728. Same—uniform rule necessary.	735. Same subject.
729. Reasonableness is a question of law for the court.	736. Ordinances in restraint of trade.
730. Rules as to reasonableness under general and implied powers.	737. Same—illustrative cases.
	738. Ordinances must not unreasonably discriminate—classification.
	739. Same—illustrative cases.

## § 724. Express power to pass.

Ordinances may be passed, first, by virtue of express grant of power; second, under a grant of power general in its nature; or, third, under incidental or implied municipal powers.<sup>a</sup> Where passed by virtue of express power, not inconsistent with the Federal Constitution or laws or the state constitution, and such power is substantially followed, or is exercised in a reasonable manner, the ordinance will be sustained, regardless of the opinion of the court respecting its reasonableness.<sup>1</sup> In

a. § 352 *ante*.

1. *Alabama*. Lindsay v. Anniston, 104 Ala. 257, 53 Am. St. Rep. 44, 16 So. 545.

*Colorado*. Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902.

*Florida*. Patterson v. Taylor,

51 Fla. 275, 283, 40 So. 493, quoting from Haynes v. Cape May, 50 N. J. L. 55, 13 Atl. 231.

*Illinois*. Peoria v. Calhoun, 29 Ill. 317, 320; Chicago & A. Ry. Co. v. Carlinville, 103 Ill. App. 251, affirmed 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep.

brief, if passed by virtue of express power, an ordinance cannot be set aside by a court for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rest alone with the law-making power.

190; *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268.

*Indiana.* *Pittsburgh, etc. R. W. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587; *Shelbyville v. Cleveland, etc. R. W. Co.*, 146 Ind. 66, 44 N. E. 929; *Rund v. Fowler*, 142 Ind. 214, 41 N. E. 456; *Skaggs v. Martinsville*, 140 Ind. 476, 49 Am. St. Rep. 209, 33 L. R. A. 781, 39 N. E. 241; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14, 46 Am. St. Rep. 390; *Steffy v. Monroe City*, 135 Ind. 466, 41 Am. St. Rep. 436, 35 N. E. 121; *Cleveland, etc. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Chamberlain v. Evansville*, 77 Ind. 542.

*Kentucky.* *Louisville, etc. R. Co. v. Louisville*, 141 Ky. 131, 132 S. W. 184; *Chesapeake & Ohio Ry. Co. v. Maysville*, 24 Ky. L. Rep. 615, 69 S. W. 728.

*Louisiana.* *State v. Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481.

*Michigan.* *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578.

*Missouri.* *Morse v. Westport*, 136 Mo. 276, 37 S. W. 932; *Heman v. Ring*, 85 Mo. App. 231.

*Minnesota.* *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278.

*Nebraska.* *Anderson v. State*, 69 Neb. 686, 96 N. W. 149.

*New York.* *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Brooklyn v. Breslin*, 57 N. Y. 591, 596.

*New Jersey.* *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231, affirmed 52 N. J. L. 180, 19 Atl. 176; *Breninger v. Belvidere*, 44 N. J. L. 350; *Ivins v. Trenton*, 68 N. J. L. 501, 53 Atl. 202, affirmed 69 N. J. L. 451, 55 Atl. 1122.

*Pennsylvania.* *Ligonier Valley R. Co. v. Latrobe*, 216 Pa. St. 221, 65 Atl. 548.

*South Carolina.* *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906.

*Texas.* *Chimine v. Baker*, 8 Tex. Ct. Rep. 10, 75 S. W. 330.

*United States.* *District of Columbia v. Waggaman*, 15 D. C. Rep. (4 Mackey) 328; *Carpenter v. Yeadon*, 51 Fed. 879.

**Express power to pass.** *Ex parte Chin Yan*, 60 Cal. 78, 83, where it is said that this rule "is sustained by common law and authority. It is the outcome of a judicious application of legal principles."

Where a statute expressly authorizes a municipal board to designate the number of street railway tracks that shall be laid in any street, lane or avenue of the city, the court cannot set aside as unreasonable an ordinance which authorizes the laying of a double track. *State (Kennelly) v. Jersey City*, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

"It is now pretty generally conceded that if a statute gives power to any person or body of persons to make rules for a specific purpose, the reasonableness of such

But whether or not the municipality had power to enact an ordinance, or whether the ordinance is valid and constitutional, is for the courts.<sup>2</sup>

"Where the power to enact the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute so as to affect its validity."<sup>3</sup> "The power of a court to declare an ordinance unreasonable

rules, provided they are strictly confined to the purpose for which they are authorized to be made, is not examinable by the judges." Biggar, Mun. Manual of Canada, p. 331, citing *Simmons v. Malling Rural District Council*, 13 Times L. R. 447, per Wright, J.

"The question, therefore, whether a municipal by-law is or is not reasonable appears to be, as a rule, only a branch of the question whether it is or is not *ultra vires*." Biggar, Mun. Manual of Canada, p. 331; *Reg. v. Gravelle*, 10 Ontario Rep. 735.

If the by-law simply follows the words of the statute it will not be held unreasonable. *Re Croome and City of Brantford*, 6 Ontario Rep. 188, 191, 192; *Re Milloy and Tp. of Onondaga*, 6 Ontario Rep. 573, 577.

"It is well settled that when the adoption of a municipal ordinance or by-law is expressly authorized by the legislature, and when the express grant of power is not in conflict with a constitutional prohibition or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal." *Belling v. Evans-*

*ville*, 144 Ind. 644, 35 L. R. A. 272, 42 N. E. 621.

2. *Brunson v. Youmans*, 76 S. C. 128, 56 S. E. 651; *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326; *Ogden City v. Crossman*, 17 Utah 66, 53 Pac. 985.

An ordinance passed without authority therefor is void. *Goar v. Rosenberg*, 53 Tex. Civ. App. 218, 115 S. W. 653.

3. *Shea v. Muncie*, 148 Ind. 14, 23, 46 N. E. 138; *In re Anderson*, 69 Neb. 686, 96 N. W. 149.

"Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the powers granted, prescribing penalties within the designated limit, cannot be set aside by the courts because they may deem it unreasonable or against public policy." *Pittsburgh, etc. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

and therefore void is practically restricted to cases in which the legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely.”<sup>4</sup>

This rule is well illustrated in a Missouri case where the charter of the City of St. Louis authorized that city to regulate bawdy houses. Napton, J., said: “It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who no doubt designed to promote morality, and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object, is a question with which the courts have no concern.”<sup>5</sup>

However, where authority to tax land for a local improvement is not expressly granted, but is to be implied from the authority delegated, an ordinance involving the exercise of it may be declared invalid because unreasonable.<sup>6</sup> And in a Missouri case, it was held that in a suit on a special tax bill for the building of a sidewalk, evidence was admissible to show that the ordinance authorizing its construction was unnecessary and oppressive, it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk. This case may be said to be exceptional, for it appears that there was ample charter power to construct sidewalks by special taxation.<sup>7</sup>

4. *Coal Fleet v. Jeffersonville*, 112 Ind. 15, 19, 13 N. E. 115.

6. *Skinker v. Heman*, 64 Mo. App. 441.

5. *State v. Clarke*, 54 Mo. 17, 36; *Kansas City v. Trieb*, 76 Mo. App. 478.

7. *Corrigan v. Gage*, 68 Mo. 541.

## § 725. General grant and implied or incidental powers.

Courts will review the question as to reasonableness of ordinances passed under a grant of power general in its nature, or under incidental or implied municipal powers, and, if any given ordinance is found unreasonable, will declare it void as a matter of law.<sup>8</sup> For in

8. *Alabama.* *Ex parte Byrd*, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

*Arkansas.* *Taylor v. Pine Bluff*, 34 Ark. 603; *Waters v. Leech*, 3 Ark. 110.

*California.* *Ex parte Chin Yan*, 60 Cal. 78; *Ex parte Frank*, 52 Cal. 606.

*Connecticut.* *State v. Cederaski*, 80 Conn. 478, 69 Atl. 19.

*Georgia.* *Toney v. Macon*, 119 Ga. 83, 46 S. E. 80; *Gilham v. Wells*, 64 Ga. 192.

*Illinois.* *People v. Grand Trunk Western R. Co.*, 232 Ill. 292, 83 N. E. 839; *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65; *Chicago, etc. R. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190; *Pierce v. Aurora*, 81 Ill. App. 670; *Peoria v. Gugenheim*, 61 Ill. App. 374.

*Indiana.* *Champher v. Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; *Pittsburg, etc. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; *Cleveland, etc. R. Co. v. Connersville*, 147

Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418.

*Iowa.* *Davis v. Anita*, 73 Iowa 325, 35 N. W. 244; *State Center v. Barenstein*, 66 Iowa 249, 23 N. W. 652; *Meyers v. Chicago, etc. R. Co.*, 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50.

*Kansas.* *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

*Louisiana.* *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277.

*Maryland.* *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

*Massachusetts.* *Com. v. Robertson*, 5 Cush. 438, 442; *Boston v. Shaw*, 1 Metc. 130; *Conn. v. Worcester*, 3 Pick. 462.

*Michigan.* *Saginaw v. Swift Electric Light Co.*, 113 Mich. 660, 72 N. W. 6; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

*Missouri.* *Salem v. Young* (Mo. App., 1910), 125 S. W. 857; *Cape Girardeau v. Riley*, 72 Mo. 220; *Skinker v. Heman*, 64 Mo. App. 441; *Springfield v. Starke*, 93 Mo. App. 70; *Lamar v. Weldman*, 57 Mo. App. 507.

*New Jersey.* *State v. Lowery*, 49 N. J. L. 391, 8 Atl. 513; *State v. Jersey City*, 47 N. J. L. 286; *State v. East Orange*, 41 N. J. L. 127; *State v. Jersey City*, 37 N.

every power given to a municipal corporation to pass by-laws or ordinances there is an implied restriction that the by-laws or ordinances will be reasonable, consistent with the general law and policy of the state, uniform in their operation, and promotive rather than destructive of lawful business and occupations.<sup>9</sup> "It is elementary that ordinances other than those passed by virtue of express grant of power must be reasonable and not oppressive."<sup>10</sup> And the fact that the ordinance was submitted

J. L. 348; *Paxson v. Sweet*, 13 N. J. L. 196.

*New York.* *Yonkers v. Yonkers R. Co.*, 64 N. Y. S. 955, 51 N. Y. App. Div. 271; *Buffalo v. Collins Baking Co.*, 57 N. Y. S. 347, 39 N. Y. App. Div. 432; *People v. Rochester*, 44 Hun 166; *Buffalo v. Webster*, 10 Wend. 99.

*Pennsylvania.* *Kneedler v. Norristown*, 100 Pa. St. 368, 45 Am. Rep. 383; *O'Maley v. Freeport*, 96 Pa. St. 24, 30, 42 Am. Rep. 527; *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Scranton v. Straff*, 28 Pa. Super. Ct. 258; *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. Rep. 936, 20 Atl. 551.

*Tennessee.* *Ward v. Greenville*, 67 Tenn. (8 Baxt.) 228, 35 Am. Rep. 700; *Memphis v. Winfield*, 8 Humph. 707.

*Texas.* *Ex parte Battis*, 40 Tex. Cr. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. Rep. 708; *Ex parte McCarver*, 39 Tex. Crim. Rep. 448, 46 S. W. 936, 42 L. R. A. 587.

*Virginia.* *Kirkham v. Russell*, 76 Va. 956.

*Wisconsin.* *State v. Deering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep.

352; *Clason v. Milwaukee*, 30 Wis. 316; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

*United States.* *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, 19 L. Ed. 984.

*Canada.* *Davis v. Clifton Municipality*, 8 U. C. C. P. 236; *Davies v. Morgan*, 1 Crompt. & J., 587; *Chamberlain of London v. Crompton*, 7 D. & R. 597; *Clark v. Le Cren*, 9 B. & C. 52; *Gosling v. Velej*, 12 Q. B. 328; *Society of Scriveners v. Brooking*, 3 Q. B. 95; *Elwood v. Bullock*, 6 Q. B. 383; *Re McCutcheon and City of Toronto*, 22 Up. Can. Q. B. 613; *Waite v. Garston Local Board of Health*, L. R. 3 Q. B. 5; *Hall v. Nixon*, L. R. 10 Q. B. 152.

*England.* *Slaterry v. Naylor*, 13 App. Cas. 446, 57 L. J. C. P. 73, 59 L. T. 41, 36 W. R. 897.

9. *Johnson v. Philadelphia* (Miss., 1908), 47 So. 526.

10. *Lane v. Concord*, 70 N. H. 485, 488, 49 Atl. 687, 85 Am. St. Rep. 643, relating to nuisances.

**Ordinances must be reasonable.** "When an ordinance is plainly unreasonable and prohibitive in its character the courts may interfere and pronounce it invalid." *Endel-*

to and approved by a majority of the electors of the municipal corporation does not prevent the court from determining its reasonableness, if passed under a general grant of power, or by virtue of implied or incidental powers.<sup>11</sup>

The general rule under consideration is thus tersely stated in a New Jersey case: "Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute, or other special authority, emanating from the creating power, must be shown to legalize it."<sup>12</sup> However, it is also a general rule usually

man v. Bloomington, 137 Ill. App. 483.

Municipal ordinances based on general powers must be reasonable. Savannah v. Cooper, 131 Ga. 670, 63 S. E. 138.

"This is upon the presumption that the legislature did not intend by the general terms of the statute to authorize the making of such an ordinance." Weigand v. District of Columbia, 22 App. Cas. (D. C.) 559.

Ordinances "must be such as prudence and reason require, not necessarily prejudicial to private rights and interests." Hayes v. Appleton, 24 Wis. 542.

"By-laws which are nugatory and vexatious, unequal, oppressive or manifestly detrimental to the interest of the corporation are void." Angell & Ames on Corp., § 347.

"The general doctrines that the reasonableness of an ordinance is a subject of judicial inquiry, in suits to enforce rights claimed to arise thereunder, runs like a thread of gold through our case

law. The doctrine is too firmly buttressed on reason and authority to be now mined by hostile criticism, let alone exploded." State ex rel. v. Birch, 186 Mo. 205, 219, 85 S. W. 361.

"If by-laws (passed under an authority conferred in general terms) are found to be partial and unequal in their operation as between different classes; if they are manifestly unjust; if they disclose bad faith; if they involve such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men—the court may well say, 'Parliament never intended to give authority to make such rules. They are unreasonable and *ultra vires*.'" Per Lord Russell, C. J., in Kruse v. Johnson, 2 Q. B. 91, 14 Times L. R. 416.

11. Le Feber v. West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

12. Taylor v. Griswold, 14 N. J. L. 222, 235, per Hornblower, C. J.



applied that where the ordinance is fairly within the incidental or implied powers of the municipal corporation, is positive, definite and certain in its terms, general, uniform and impartial in its operation, and is not in restraint of trade, oppressive or in contravention of common rights, it will not be declared unreasonable.<sup>13</sup>

The grounds upon which an ordinance may be declared void for unreasonableness have been said to be three: First, where it is oppressive, unequal and unjust; second, when it is altogether unreasonable; and third, when unreasonable.<sup>14</sup>

### § 726. Mode of exercise of express power must be reasonable.

The mode prescribed for the exercise of the power must be strictly followed,<sup>15</sup> and where the ordinance provisions are more specific and detailed than the expression of general power conferred, the court will determine the reasonableness of such provisions.<sup>16</sup> And

13. *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; *Tugman v. Chicago*, 78 Ill. 405.

**Ordinance must be fair and impartial.** Municipal ordinances must not be unreasonably prejudicial to private rights and interests; must be impartial, fair, and general, and not oppressive in their character. *Eastern Wisconsin R., etc. Co. v. Hackett*, 135 Wis. 464, 115 N. W. 376, 381.

"It is a fundamental proposition that an ordinance must be fair in its terms, impartial in its operation, and general in its application." *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, citing *McQuillin, Mun. Ord.*, § 193.

14. *Cape Girardeau v. Riley*, 72

Mo. 220; *Plattsburg v. Riley*, 42 Mo. App. 18; *Kansas City v. Cook*, 38 Mo. App. 660; *State v. Beattie*, 16 Mo. App. 131.

15. *Biggar, Municipal Manual of Canada*, p. 331; *State (Delaware, L. & W. R. Co.) v. East Orange*, 41 N. J. L. 127; *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578, 2 L. R. A. 721, 41 N. W. 275.

16. *State (Trenton Horse R. Co.) v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076.

**Mode of exercise of power must be reasonable.** "Where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, then the ordinance passed pursuant

where the mode of the exercise of a power expressly granted is not prescribed, courts will assume to determine whether the provisions of the ordinance respecting the mode adopted is reasonable, for in no event will an arbitrary and unreasonable exercise of the power conferred be upheld by the judiciary.<sup>17</sup>

The general doctrine is thus well stated in a recent Wisconsin case: "The power of a city to pass ordinances must be reasonably exercised, but within the field delegated it may go to the boundaries of reason, and within that field its discretionary power is supreme."<sup>18</sup>

#### § 727. Same—illustrative cases.

In accordance with the principle stated in the prior section, notwithstanding the existence of express power, an ordinance was held unreasonable in a Virginia case, which provided for the time of election of certain city officers by the council where the effect of which was to allow the expiring council to select such officers, who would serve during the incumbency of the new council, only three days before the council would go out of existence. Under the circumstances the court was of the opinion that the policy of the electors, as shown by the

thereto must be a reasonable exercise of the power or it will be pronounced invalid." *Pittsburgh, etc. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

Same rule laid down in: *Chicago, etc. R. Co. v. Carlinville*, 103 Ill. App. 251, affirmed 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190; *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578.

An ordinance limiting the rate of speed of trains within the municipal limits to the minimum

limit fixed by statute was held reviewable by the court as to its reasonableness. *Chicago & A. Ry. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190.

17. *Blackshear v. Strickland*, 126 Ga. 492, 54 S. E. 966, citing *McQuillin*, Mun. Ord., §§ 183, 184; *Lake View v. Tate*, 130 Ill. 247, 252, 6 L. R. A. 268, 22 N. E. 791; *Murphy v. Chicago, etc. R. Co.*, 247 Ill. 614, 93 N. E. 381.

18. *Beck Co. v. Milwaukee*, 139 Wis. 340, 120 N. W. 293, 295.

election of the new council, should not be set at naught by the action of the old council.<sup>19</sup>

Where the charter gave the city express authority to construct and regulate the use of sewers, an ordinance was sustained in a Missouri case which denied permits to connect private sewers with the city's sewers until the applicant had paid a special tax bill due the contractor who built the sewer with which connection was sought.<sup>20</sup> On the other hand, in a New Jersey case an ordinance was declared void which refused a supply of water from the city water works on proper application of the owner, because his tenant was in arrears for water furnished to him by the city, while such tenant rented another house, owned by another person. The court said that to refuse to furnish water to the tenant, unless the owner should pay a debt due from the tenant to the city for water furnished to him elsewhere on premises not belonging to the applicant, would obviously be to compel him to pay the tenant's debt as a condition precedent to obtaining the water for his premises while occupied by the tenant.<sup>21</sup> In the Missouri case, the court, in effect, compels the applicant to pay his debt, not due to the city, but to a contractor who built the sewer. The power to regulate sewers is entirely different from the power to enforce payment of valid indebtedness. Undoubtedly the city was authorized to make all reasonable regulations in order to secure and protect the public, but a regulation for the sole benefit of contractors, to enable them to collect special tax bills, could hardly be considered as a regulation for the benefit of the public. The contractor was fully protected. The city had issued him valid tax bills which were enforceable against the applicant's property.<sup>22</sup>

19. *Kirkham v. Russell*, 76 Va. 956.

20. *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116.

21. *Dayton v. Quigley*, 29 N. J. Eq. 77.

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22. The St. Louis Court of Appeals prior to the decision of the Supreme Court made a contrary ruling which appears to be entirely sound. *State ex rel. v. Hermann*, 84 Mo. App. 1.

Under a charter authorizing the town to require all male citizens between the ages of twenty-one and fifty to work on the streets, an ordinance imposing such duty on those between twenty and forty-five years was held to be a reasonable exercise of the power, although those between forty-five and fifty were not included.<sup>23</sup>

An ordinance passed by virtue of express power that a railroad company light its line by electricity within twenty days after notice of the passage of the ordinance in the opinion of the Supreme Court of Ohio, is not necessarily unreasonable.<sup>24</sup>

### § 728. Same—uniform rule necessary.

Notwithstanding express power may exist to enact, the ordinance must provide a uniform rule of action; it must contain permanent legal provisions, operating generally and impartially, for its enforcement cannot be left to the will or unregulated discretion of the municipal authorities or any officer of the corporation.<sup>25</sup> The

In authorizing the connection of private drains with city sewers where the apportionment of the expenses is unequal the ordinance providing therefor will be held unreasonable. *Boston v. Shaw*, 1 Met. (Mass.) 130.

23. *Tipton v. Norman*, 72 Mo. 380.

24. *St. Mary v. Lake Erie & W. R. Co.*, 60 Ohio St. 136, 53 N. E. 795, 41 Ohio L. J. 345.

25. Uniform rule. An ordinance "cannot be sustained on the ground that the borough officers understand it and will use it fairly. It does not deserve to be called an ordinance at all, and especially a penal one, when it is so elastic in its provisions." (The ordinance related to licensing wagons of non-residents.) Per

*Lowrie, J.*, in *Bennett v. Birmingham*, 31 Pa. St. 15, 18.

Regulating navigation. *Horn v. People*, 26 Mich. 221, 226.

Granting or withholding licenses. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *In re Tie Loy*, 26 Fed. 611; *State v. Conlon*, 65 Conn. 478, 33 Atl. 519; *State Center v. Barenstein*, 66 Iowa 249, 23 N. W. 652.

Smoking in street car. *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621.

Smoke ordinance. *Dictum* as to enforcing. *St. Louis v. Heitzberg P. & P. Co.*, 141 Mo. 375, 39 L. R. A. 551, 64 Am. St. Rep. 516, 42 S. W. 954.

Miscellaneous instances.

*Arkansas*. *Helena v. Dwyer*, 64 Ark. 424, 62 Am. St. Rep. 206, 42 S. W. 1071.

rule applicable has been clearly phrased in a Florida case, as follows: "A public duty which the legislature has confided to the deliberative judgment or discretion of the law-making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others."<sup>26</sup>

In consonance with the rule the following have been declared invalid: An ordinance giving a municipal official power to allow or prohibit parades within his discretion;<sup>27</sup> an ordinance subjecting the right to erect and maintain engines and boilers to the unrestrained will and unlimited discretion of the mayor;<sup>28</sup> and an ordinance requiring all saloons to be closed between certain hours "unless by special permission of the president," of the

*Colorado.* May v. People, 1 Colo. App. 157, 27 Pac. 1010.

*Illinois.* Lake View v. Letz, 44 Ill. 81; Braceville v. Doherty, 30 Ill. App. 645.

*Indiana.* Bills v. Goshen, 117 Ind. 221, 20 N. E. 115; Evansville v. Martin, 41 Ind. 145; Richmond v. Dudley, 129 Ind. 112, 28 N. E. 312.

*Kansas.* Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123; Crawford v. Topeka, 51 Kan. 750, 37 Am. St. Rep. 323, 33 Pac. 476.

*Louisiana.* State v. Morris, 47 La. Ann. 1660, 18 So. 710.

*Massachusetts.* Newton v. Belger, 143 Mass. 598, 10 N. E. 464.

*Mississippi.* Pieri v. Shieldsboro, 42 Miss. 493.

*New York.* New York v. Dry Dock, etc. R. R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

*North Carolina.* State v. Webber, 107 N. C. 962, 12 S. E. 598; State v. Hunter, 106 N. C. 796,

11 S. E. 366; State v. Tenant, 110 N. C. 609, 14 S. E. 387.

*South Carolina.* St. Luke's Ch. v. Mathews, 4 Des. (S. C.) 578, 6 Am. Dec. 619.

*United States.* Barthet v. New Orleans, 24 Fed. 563.

26. Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558.

27. Regulating street parades. In re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; State v. Deering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719.

See chapter relating to municipal police powers and chapter on license tax and ordinances relating thereto.

28. Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239, 21 Alb. L. Journal 117.

village.<sup>29</sup> But in Massachusetts, ordinances giving limited discretionary powers to public officers have been sustained, as for example, an ordinance providing that awnings extending over the streets shall not be maintained without the consent of the mayor and aldermen, and conferring power to forbid the use of awnings altogether respecting particular buildings.<sup>30</sup> So an ordinance of St. Paul regulating cabs, hacks and carriages, which provided that hackmen and drivers of hacks, etc., when at any railroad depot, station or theater, etc., shall obey the commands and direction of the police officer on duty at such place and shall take the places assigned them, was sustained as proper police regulations for the preservation of order, etc.<sup>31</sup>

29. *Little Chute v. Van Camp*, 136 Wis. 526, 117 N. W. 1012.

30. *Pedrick v. Bailey*, 12 Gray (Mass.) 161.

By statute a city was made liable to damages resulting from the fall of awnings dangerous to pedestrians. *Drake v. Lowell*, 13 Metc. (Mass.) 292.

31. **Discretionary regulations.** "It is a matter of common knowledge that at and about the hours of the arrival and departure of trains, confusion and disorderly howling and breaches of the peace are very apt to occur at and about depots and stations in considerable towns, especially among those who are engaged in carrying passengers and baggage from such depots and stations. The only efficient preventive or remedy in the premises appears to be to put a police officer upon the spot, whose duty it shall be to enforce such applicable ordinances as the city council, in the exercise of chartered powers, may have seen fit to adopt. This seems to be the gen-

eral if not universal practice in all large cities and towns. As it is manifestly impracticable and impossible to define minutely every case of disorder or confusion it is proper—in fact, it is necessary—that the officer on duty should be invested with some general authority to preserve order, and thus determine on the emergency what acts are disorderly or likely to lead to disorder, though, of course, this authority would not justify him in arbitrary or unreasonable action. Upon these grounds we think the ordinance in question valid and justifiable. The assigning of a particular place to each hackman would appear to be peculiarly and happily adapted to the preservation of order. By this practice every one is informed exactly where his proper place is, so that the strife and contention for particular places which would otherwise ensue is measurably, at any rate, prevented. The authority thus to assign places must necessarily be committed to some po-

# § 729. Reasonableness is a question of law for the court.

The doctrine is uniformly supported that the question whether an ordinance is reasonable is one of law for the court.<sup>32</sup> This is the rule, declares the supreme court

liceman on duty at the depot or station." *St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734.

*Emerson v. McNeil*, 84 Ark. 552, 554, 106 S. W. 479, 480, citing *McQuillin*, Mun. Ord., § 184.

Ordinance forbidding the conducting of a house of ill-fame in an "indecent manner," necessarily clothes the magistrate with discretion in determining whether particular acts proved are indecent, but it is not void for that reason. *Shreveport v. Roos*, 35 La. Ann. 1010.

Discretion may be vested in officer respecting enforcement of law, e. g., as to use of bicycle or tricycle or other non-horse vehicles, on highways, where the discretion is for the lawful purpose of effectuating the just intent of the law. *State v. Yopp*, 97 N. C. 477, 482, 2 Am. St. Rep. 305, 2 S. E. 458.

But arbitrary powers conferred upon officers cannot be sustained. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

An ordinance requiring all shops to be closed at a certain hour, was held invalid. *Coaticook v. Lathrop*, 22 Quebec Super. Ct. 225.

32. *Alabama*. *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130.

*California*. *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Merced County v. Fleming*, 111 Cal. 46, 51, 43 Pac. 392.

*Illinois*. *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373; *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268.

*Louisiana*. *State v. Fourcade*, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

*Maine*. *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750.

*Massachusetts*. *Austin v. Murray*, 16 Pick. (Mass.) 121; *Boston v. Shaw*, 1 Met. (Mass.) 130; *In re Goddard*, 16 Pick. (Mass.) 504; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462; *In re Vandine*, 6 Pick. 187, 17 Am. Dec. 351.

*Missouri*. *Barton v. Odessa*, 109 Mo. App. 76, 82 S. W. 1119; *St. Louis v. Weber*, 44 Mo. 547.

*New Jersey*. *State (Long) v. Jersey City*, 37 N. J. L. 348, 351; *Paxson v. Sweet*, 13 N. J. L. 196; *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; *State v. East Orange*, 41 N. J. L. 127.

*New York*. *Brooklyn v. Breslin*, 57 N. Y. 591; *Hudson v. Thorne*, 7 Paige Ch. (N. Y.) 261; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Buffalo v. Webster*, 10 Wend. (N. Y.) 100; *People ex rel. v. Throop*, 12 Wend. (N. Y.) 183, 186.

*Pennsylvania*. *Commissioners of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318, 321; *Kneedler v. Norristown*, 100 Pa. St. 368, 45 Am. Rep. 383; *Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291; *Scranton City v. Straff*, 28 Pa. Super. Ct. 258.

of Minnesota, both when the invalidity of the ordinance is apparent on its face and where the invalidity is made to appear from extrinsic facts.<sup>33</sup>

A few Wisconsin cases have held that, under particular circumstances, as where the question of reasonableness depended upon the existence of certain facts concerning which the court possessed no judicial knowledge, it is entirely proper to look into the facts and submit the question of reasonableness to the jury.<sup>34</sup> And in a Texas case the law on the subject was stated to be that, where the facts which may render an ordinance reasonable or unreasonable, are controverted, they should be submitted to the jury to pass upon.<sup>35</sup> So a North Carolina decision expresses the view that "the reasonableness of an ordinance is for the court, the jury only being called in to find the facts, when in dispute."<sup>36</sup> However, in a California case it is urged that, the ques-

*Virginia.* Washington Southern R. Co. v. Lacy, 94 Va. 460, 26 S. E. 834.

As to power to pass. Peoria v. Calhoun, 29 Ill. 317, 320.

Private corporation. State v. Overton, 24 N. J. L. 435, 440; Marion v. Chandler, 6 Ala. 899; South Florida R. R. Co. v. Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506; Hibernia L. E. Co. v. Com., 93 Pa. St. 264.

As to speed of train. Zumault v. Kansas City & I. Air Line, 71 Mo. App. 670.

Regulating pawnbrokers. Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625.

33. Evison v. Chicago, etc. R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, where it is said: "An ordinance is in the nature of a local statute, and it would seem anomalous to leave it to the jury to determine whether a law is

valid. Certainly, if the invalidity is apparent on the face of the statute or ordinance, it has always been held a question of law for the court, and we cannot perceive why a rule should be different where the invalidity is made to appear from extrinsic facts. Any other rule would lead to the embarrassing result that, upon the same state of facts, one jury might hold an ordinance valid and another jury hold it invalid."

34. Clason v. Milwaukee, 30 Wis. 316; Hayes v. Appleton, 24 Wis. 542; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 160, 18 N. W. 764.

35. Austin v. Austin City Cemetery Assn., 87 Tex. 330, 28 S. W. 528, 1023, 47 Am. St. Rep. 114.

36. Small v. Edenton, 146 N. C. 527, 530, 60 S. E. 413, 20 L. R. A. (N. S.) 145.



tion must be determined from an inspection of the ordinance, and that evidence cannot be received to show the manner in which it was or might be enforced.<sup>37</sup>

In passing on the reasonableness of ordinances the court will consider all of the circumstances, the necessity of such regulations, and will usually consider somewhat in detail the various provisions of the ordinance.<sup>38</sup>

### § 730. Rules as to reasonableness under general and implied powers.

It has been well said that, "the legal rule that by-laws must be reasonable is perhaps as definite as it can be made with safety."<sup>39</sup> However, certain judicial expressions may serve as general guides. It must appear from the inherent character of the act, or by evidence of the operation of the ordinance, that it is unreasonable.<sup>40</sup>

37. *Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392.

38. *California*. *Los Angeles Co. v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

*Massachusetts*. *In re Vandine*, 6 Pick. (Mass.) 187; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 569.

*Minnesota*. *Evison v. Chicago, etc. R. R. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434.

*Missouri*. *Lamar v. Weidman*, 57 Mo. App. 507; *Hannibal v. Mo. & K. T. Co.*, 31 Mo. App. 23.

*Texas*. *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528.

39. *Per Campbell, C. J.*, *In re Frazee*, 63 Mich. 396, 407, 30 N. W. 72.

"The question whether a by-law is reasonable or not usually depends upon whether it can rea-

sonably be considered as authorized by general words used in the charter or statute under the presumed authority of which it has been passed. In many of the earlier cases, the judges in determining upon the reasonableness of by-laws assumed a much larger jurisdiction in this respect than would at present be deemed proper." *Biggar, Mun. Manual of Canada*, p. 330.

The question of the reasonableness of the ordinance is to be determined by all the circumstances, the objects sought to be attained and the reason and necessity for the existence of the ordinance. *Chicago A. Ry. Co. v. Carlville*, 103 Ill. App. 251, affirmed 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Ann. St. Rep. 190.

40. *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146.

The reasonableness of the ordinance is not to be tested in all cases by its application to extreme illustrations.<sup>41</sup> "An ordinance, general in its scope, may be adjudged reasonable as applied to one state of facts and unreasonable when applied to circumstances of a different character."<sup>42</sup> Thus an ordinance regulating the use of streets by railroads, although unreasonable in its application to one or two streets, will not be vacated in its entirety on such account—the remedy is to resist its enforcement in such locality.<sup>43</sup> So an ordinance may be valid in its general purpose, but unreasonable and oppressive as applied to certain property.<sup>44</sup> The ordinance must be reasonable as applied to the particular subject matter.<sup>45</sup> Judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised.<sup>46</sup>

### § 731. Same subject.

The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances,<sup>47</sup> and

41. *Commonwealth v. Plaisted*, 148 Mass. 375, 382, 19 N. E. 224; *Commonwealth v. Cutter*, 156 Mass. 52, 56, 29 N. E. 1146.

42. *Nicoulin v. Lowrey*, 49 N. J. L. 391, 394, 8 Atl. 513; *Skinker v. Heman*, 64 Mo. App. 441; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687.

43. *State (Pa. R. R. Co.) v. Jersey City*, 47 N. J. L. 286, 289. See §§ 661, 662 *ante*.

44. If an ordinance is oppressive as applied to certain property, the owner thereof may, by proper proceedings, test its validity, if done within seasonable time. *Heman v. Ring*, 85 Mo. App. 231.

45. *Willow Springs v. Withaupt*, 61 Mo. App. 275; *People v. Arm-*

*strong*, 73 Mich. 288, 16 Am. St. Rep. 578, 41 N. W. 275, 2 L. R. A. 721.

46. *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438.

47. *Alabama. Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.

*California. Ex parte Delaney*, 43 Cal. 478; *Ex parte Smith*, 38 Cal. 702.

*Kentucky. Louisville v. Roupe*, 6 B. Mon. (Ky.) 591.

*Maryland. Sprigg v. Garrett Park*, 89 Md. 406.

*Massachusetts. Commonwealth v. Patch*, 97 Mass. 221.

*Missouri. Lamar v. Weidman*, 57 Mo. App. 507; *Hannibal v. M. & K. Tel. Co.*, 31 Mo. App. 23.

hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence.<sup>48</sup> Thus, while an ordinance requiring street railways to run not less than one car every twenty minutes, between certain hours, will be presumed to be reasonable, it may be avoided by proving that the convenience of passengers does not require the running of cars as specified.<sup>49</sup> In questions of doubt, the courts are

*New Jersey.* Budd v. Camden, 69 N. J. L. 193, 54 Atl. 569.

*Pennsylvania.* Bailey v. Philadelphia, 184 Pa. St. 594, 63 Am. St. Rep. 812, 39 Atl. 494.

**Reasonableness for municipality, when.** "As by-laws are the rules of action which the inhabitants of a place prescribe for their own government, there is a peculiar propriety in permitting them to be the judges of what rules are necessary and proper, and such is the constant, the invariable practice." Mobile v. Yuille, 3 Ala. 137, 143, 36 Am. Dec. 441.

"Where the municipal legislature has authority to act it must be governed not by our, but by its own discretion; and we shall not be hasty in convicting them of being unreasonable in the exercise of it." Fisher v. Harrisburg, 2 Grant Cases (Pa.) 291, 296.

"As a rule the municipality is the best judge of its own affairs; and it is probably an extreme case in which the court would interfere." Per Wilson, C. J., In re O'Meara and City of Ottawa, 11 Ontario Rep. 603, 609; Re Prince and City of Ottawa, 25 Up. Can. Q. B. 175; Re Snell and Town of Belleville, 30 Up. Can. Q. B. 81;

Re Cribbin and City of Toronto, 21 Ontario Rep. 325; Reg. v. Petersky, 4 British Columbia Rep. 384.

48. In re Newell, 2 Cal. App. 767, 84 Pac. 226, following In re Smith, 143 Cal. 368, 370, 77 Pac. 180; Standard Oil Co. v. Danville, 199 Ill. 50, 54, 64 N. E. 1110; Swift v. Klein, 163 Ill. 269, 45 N. E. 219; People v. Cregier, 138 Ill. 401, 28 N. E. 812; Peterson v. State, 79 Neb. 132, 112 N. W. 306; Wells v. Mt. Olivet, 31 Ky. L. Rep. 576, 578, 102 S. W. 1182, 11 L. R. A. 1080, citing McQuillin, Mun. Ord., §§ 185, 186, 327.

**There is a legal presumption that the ordinance is reasonable and the burden is upon the one who denies its validity.** State (Trenton Horse R. Co.) v. Trenton, 53 N. J. L. 132, 20 Atl. 1076; Chicago & A. Ry. Co. v. Carlinville, 103 Ill. App. 251, affirmed 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190; Snouffer v. Cedar Rapids & M. St. Ry. Co., 118 Iowa 287, 92 N. W. 79.

49. Mayor, etc. of New York v. D. D. E. B. & B. R. Co., 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563.

inclined to defer to the discretion and judgment of the municipal authorities.<sup>50</sup>

The language of the cases is that "when municipal authorities have adopted an ordinance, before a court is justified in holding the same to be invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused;"<sup>51</sup> and that "to arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in the country."<sup>52</sup>

### § 732. Same subject.

Accordingly, in determining the question, the court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance. Implied power springs from necessity. That which may be necessary for a large city, may not be necessary for a small city or borough. That which is not necessary cannot be implied.<sup>53</sup>

50. *North Chicago City R. R. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Hannibal v. M. & K. Tel. Co.*, 31 Mo. App. 23; *St. Louis v. Green*, 7 Mo. App. 468, 70 Mo. 572; *St. Louis v. Griswold*, 58 Mo. 175, 192; *Plattsburg v. Riley*, 42 Mo. App. 18; *Kansas City v. Cook*, 38 Mo. App. 660; *State v. Able*, 65 Mo. 357; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331, 85 N. W. 1036, 1042.

"In determining whether it is reasonable, the court should not substitute its discretion for that

of the municipal legislature." *Kansas City v. McAleer*, 31 Mo. App. 433, 436.

51. *Illinois Cent. R. Co. v. Scheevers*, 134 Ill. App. 514, affirmed 235 Ill. 227, 85 N. E. 192.

52. Per Putnam, J., *In re Vandine*, 6 Pick. (Mass.) 187, 191, 17 Am. Dec. 351; *Chicago & A. Ry. Co. v. Carlinville*, 103 Ill. App. 251, affirmed 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190.

53. *Scranton City v. Straff*, 28 Pa. Super. Ct. 258, 261.

Likewise, a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated.<sup>54</sup> Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police powers of a municipal corporation on the ground of unreasonableness.<sup>55</sup>

If there is no substantial connection between the assumed purpose of an ordinance and the end to be accomplished, it is unenforceable.<sup>60</sup> So to be reasonable, the ordinance must tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred.<sup>61</sup>

In viewing its reasonableness the ordinance must be judged by its purport and effect, and not by the motives or intentions of individual law-makers who participated in its enactment.<sup>62</sup> The rule usually applied is that

54. Ordinance prohibiting interments in sparsely settled portion of the city, held unreasonable. *Austin v. Murray*, 16 Pick. (Mass.) 121.

See § 664 *ante*.

55. *Massachusetts. Com. v. Mulhall*, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387; *Com. v. Ellis*, 158 Mass. 555, 33 N. E. 651; *Com. v. Elliott*, 121 Mass. 367; *Com. v. Robertson*, 5 Cush. (59 Mass.) 438, 442.

*Missouri. Plattsburg v. Riley*, 42 Mo. App. 18; *State v. Pond*, 93 Mo. 606; *Kansas City v. Cook*, 38 Mo. App. 660; *Chillicothe v. Brown*, 38 Mo. App. 609; *State v. Beattie*, 16 Mo. App. 131; *St.*

*Louis v. Weber*, 44 Mo. 547; *St. Louis v. Spiegel*, 8 Mo. App. 478. *Pennsylvania. Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820.

*Wisconsin. Milwaukee v. Gross*, 21 Wis. 241, 91 Am. Dec. 472.

60. *People v. Murphy*, 195 N. Y. 126, 88 N. E. 17, affirming 129 N. Y. App. Div. 260, 113 N. Y. S. 855, which reversed 60 N. Y. Misc. 536, 113 N. Y. S. 854.

61. *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578.

62. *Helena v. Miller*, 88 Ark. 263, 114 S. W. 237.

“courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud.”<sup>63</sup>

§ 733. Same—English cases—custom and usage.

It is important to observe that the ancient English cases cannot always be taken as satisfactory precedents and guides in this country, “inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long continued usage, ripening into a prescriptive right on the part of the municipal corporation. No such ground can be urged here.”<sup>64</sup> Therefore, when any given ordinance is objected to as being unreasonable, if it is to be sustained, as stated in a well-considered Massachusetts case, it “must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute.”<sup>65</sup>

The test of reasonableness has proved fatal to many ordinances. At one time in England courts had little hesitation in rejecting a bye-law if it seemed in any way unnecessary or too stringent.<sup>66</sup> It thus follows that the earlier English decisions “reveal a wide diversity of judicial opinion, and lay down no principle or definite standard by which reasonableness or unreasonableness can be tested.” In one case six out of seven judges sustained a by-law which forbid any person from playing music or singing within fifty yards of a dwelling-

63. Ex parte Yung, 7 Cal. App. 440, 94 Pac. 594.

See §§ 703, 704 *ante*.

64. Per Dewey, J., in Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 569, 48 Am. Dec. 679.

65. Per Dewey, J., in Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 569, 48 Am. Dec. 679; Herzo v. San Francisco, 33 Cal. 134, 145.

66. Arnold's Mun. Corp. (5th Ed., London), p. 49.

house after being requested by a constable or an inmate to desist. The point urged against the by-law was that it was not expressly limited to acts causing annoyances or nuisance. The court stated that by-laws made by local authority "ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted and credit ought to be given to those who have to administer them, that they will be reasonably administered."

\* \* \* A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or exception which some judges may think ought to be there. Surely, it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges."<sup>67</sup>

In a later case, this principle was explained as meaning "that where a thing is of such a character as that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make by-laws. The court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance; but they cannot say that it should or should not be forbidden in the particular locality."<sup>68</sup>

Many English cases treating of the reasonableness of by-laws, indicating the basis of the judgments, are set out in the note.<sup>69</sup>

67. *Kruse v. Johnson* (1898), 2 Q. B. 91, 62 J. P. 469, 67 L. J. Q. B. 782, 78 L. T. 647, 46 W. R. 630, 14 T. L. R. 416, per Lord Russell, C. J.

68. *White v. Morley* (1899), 2 Q. B. 34, 63 J. P. 550, 68 L. J. Q. B. 702, 80 L. T. 761, 47 W. R. 583, 15 T. J. R. 360.

69. **England — unreasonable by-laws.** The following by-laws have been declared unreasonable by the English courts (Prior to 1898):

A by-law prohibiting the keeping of swine in a borough between May and October in every year (*Everett v. Grapes*, 25 J. P. 644,

### § 734. Same—illustrative cases.

An ordinance passed under general powers prohibiting the opening of streets for the purpose of laying gas mains during the winter season, as from December 1st

3 L. T. 669); a by-law prohibiting street music in a borough on Sundays (*Johnson v. Croydon Corporation*, 16 Q. B. D. 708, 50 J. P. 487, 55 L. J. M. 117, 54 L. T. 295, 2 T. L. R. 371); a by-law prohibiting street music or preaching without a license from the mayor (*Munro v. Watson*, 51 J. P. 660, 57 L. T. 366, 3 T. L. R. 445); a by-law prohibiting the use of obscene or profane language in a street or public place (*Strickland v. Hayes*, 1 Q. B. 290, 60 J. P. 164, 65 L. J. M. C. 55, 74 L. T. 137, 44 W. R. 398, 12 T. L. R. 199, explained in *Thomas v. Sutters*, 1 ch. 10, 63 J. P. 724, 69 L. J., ch. 27); a by-law prohibiting street trading at night by children (*Macdonald v. Lochrane*, 51 J. P. 629, 3 T. L. R. 464).

In all the above cases, the by-laws were rejected as not being confined to matters causing annoyance or amounting to a nuisance, and apparently they are now of little or no value. *Arnold, Mun. Corp.*, p. 50. See also *Kruse v. Johnson*, *supra*; *Brownscombe v. Johnson*, 62 J. P. 326, 78 L. T. 265, 14 T. L. R. 328; and *Gentel v. Rapps*, 1 K. B. 160, 66 J. P. 117, 71 L. J. K. B. 105, 85 L. T. 683, 50 W. R. 216, 18 T. L. R. 72.

In *Strickland v. Hayes*, *supra*, it was also considered unreasonable to add to the words "in a street or public place" the words "or on land adjacent thereto." In

*Rex v. Richards*, 61 J. P. 40, a stipendiary magistrate held to be unreasonable a by-law prohibiting the posting of bills during the day-time in certain streets of a borough.

In *Elwood v. Bullock*, 6 Q. B. 383, 13 L. J. Q. B. 330, 8 Jur. 1044, a by-law prohibited the erection in any public place of entertainment booths without a license from the mayor, such license not to be granted if their neighboring householders objected; it was held to be unreasonable.

The following are the reported cases since 1898 of by-laws being rejected as unreasonable:

A by-law prohibited the sale or hawking of articles upon the seashore "except in pursuance of an agreement with the corporation." Held, unreasonable because the corporation could make any agreement they chose, and arbitrarily refuse license to particular individuals (*Parker v. Bournemouth Corporation*, 66 J. P. 440, 86 L. T. 449, 18 T. L. R. 372).

Compare with this decision, *Pelham v. Littlehampton Urban District Council*, 63 J. P. 88; *Williams v. Weston-super-Mare Urban District Council* (No. 1), 72 J. P. 54, 98 L. T. 537, 6 L. G. R. 92 (No. 2), 74 J. P. 52; and *Moorman v. Tordoff*, 72 J. P. 142, 98 L. T. 416, 6 L. G. R. 360.

A by-law prohibited the use of roundabouts on land adjoining any



to the following March, was held reasonable and binding on the gas company, but where such ordinance forbids the gas company from opening a paved street for the purpose of laying pipes from the main to the op-

street unless separated therefrom by a wall four feet high and fourteen inches thick. Held, unreasonable because it required an unnecessarily permanent and costly structure to guard against a temporary danger (*Enniscorthy Urban Council v. Field*, 2 I. R. 518); a by-law prohibited the use of streets for the distribution of papers or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, etc.: Held, unreasonable as being wide enough to cover the sale of papers giving information which it was lawful to give (*Scott v. Pilliner*, 2 K. B. 855, 68 J. P. 518, 73 L. J. K. B. 988, 91 L. T. 658, 20 T. L. R. 662).<sup>4</sup>

In certain recent cases, by-laws as to common lodging-houses have been held unreasonable as imposing a liability upon non-resident landlords, yet making no provisions for notifying them that their tenants were in default, and ignoring the fact that they might have no right of entry. *Stiles v. Galinsky*, 1 K. B. 610, 615, 68 J. P. 95, 183, 73 L. J. K. B. 100, 485, 90 L. T. 22, 91 L. T. 437, 52 W. R. 399, 462; *Arlidge v. Islington Borough Council*, 2 K. B. 127, 73 J. P. 301, 78 L. J. K. B. 553, 100 L. T. 903, 25 T. L. R. 470, 71 L. G. R. 649).

As to the reasonableness of a power to reject plans arbitrarily, see *Cook v. Hanisworth*, 2 Q. B.

85, 65 L. J. M. C. 190, 75 L. T. 51, 44 W. R. 541; and as to making a master responsible for his servant's acts, see *Collman v. Mills*, 1 Q. B. 396, 66 L. J. Q. B. 170, 75 L. T. 590; and *Heiton & Co. v. McSweeney*, 2 I. R. 47; *Arnold's Law of Mun. Corp.* (5th Ed., London), pp. 50 and 51.

**Reasonable by-laws.** The English courts have sustained the following by-laws as reasonable: By-laws requiring vehicles to carry lights at night, *Adamson v. Miller*, 16 T. L. R. 450; *Heiton & Co. v. McSweeney*, 2 I. R. 47, in which the master was made responsible for his servant's non-compliance; a by-law prohibiting persons from singing or playing in the streets after being requested to desist on account of illness or other reasonable cause, it being for the justices to say what was a reasonable cause (*Rex v. Powell*, 48 J. P. 740, 51 L. T. 92; see also *Booth v. Howell*, 53 J. P. 678, 5 T. L. R. 449); a by-law prohibiting the use of any organ or musical instrument worked by steam or mechanical means, although admittedly it was wide enough to cover the use of a musical box in a house (*Southend Corporation v. Davis*, 6 T. L. R. 167); a by-law prohibiting (except in lawful fairs) the keeping of any shooting gallery, roundabouts, or swingboat, etc., to the annoyance or disturbance of resi-

posite side of the street it is unreasonable and void.<sup>70</sup> So, under general power, an ordinance forbidding the running of a steamboat unless provided with a spark-catcher, screen or other device, "substantially attached in or upon the smokestack, \* \* \* so as to prevent the escape of sparks or burning cinders therefrom as effectually as the same can be prevented by any means known or in use for that purpose," was held unreasonable.<sup>71</sup> So, without special grant, a police regulation

dents or passengers (*Teale v. Harris*, 60 J. P. 744, 13 T. L. R. 15); a by-law prohibiting the exposure for sale of unsound meat or other victuals (*Shillito v. Thompson*, 1 Q. B. D. 12, 45 L. J. M. C. 18, 13 L. T. 506, 24 W. R. 57); a by-law prohibiting cries in the market or streets to the annoyance of the inhabitants (*Innes v. Newman*, 2 Q. B. 292, 58 J. P. 543, 63 L. J. M. C. 198, 70 L. T. 689, 42 W. R. 573, 10 T. L. R. 479); a by-law similarly prohibiting violent abusive, profane or indecent language or conduct (*Mantle v. Jordan*, 1 Q. B. 248, 61 J. P. 119, 66 L. J. Q. B. 224, 75 L. T. 552, 13 T. L. R. 121).

As to a by-law prohibiting football in streets, see *Pearson v. Whitfield* (1888), 52 J. P. 708n.

In *Gentel v. Rapps*, 1 K. B. 160, 66 J. P. 117, 71 L. J. K. B. 105, 85 L. T. 683, 50 W. R. 216, 18 T. L. R. 72; a by-law was held valid which prohibited the use of offensive language on tramcars, but did not say "to the annoyance of passengers." *Arnold's Law of Mun. Corp.* (5th Ed., London), p. 51.

70. Unreasonable ordinances illustrated. In this case it was said, per *Rogers, J.*, "The effect

of the ordinance is, to compel the company to construct two mains, one on each side of the street, instead of one, thereby materially increasing the expense (p. 323) to the company, and consequently enhancing the price of gas to the inhabitants of the district. This, we think, an unreasonable exercise of authority, and consequently not within the power of the board. A by-law must be reasonable and for the common benefit; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit." *Comrs. of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318, 322, 323.

71. "Under this ordinance, every steamboat owner, no matter how careful he had been to use the means of preventing the sparks from escaping from the smoke-stack of his boat while navigating the harbor, would still be liable for a violation of the ordinance if a jury could be satisfied that his device was not the best known or in use; and if the ordinance is to be strictly enforced he would be equally liable although the device used was as effective for the purpose as any other, if it were not substantially attached

requiring the city constable to attend theater performances and requiring the proprietor to pay the constable, is unreasonable and void.<sup>72</sup>

An ordinance making the owner of a dog liable to a penalty if such dog bite any person on the street was held reasonable. Here it appears that the state law made the owner of the dog liable "to the party injured for all damages done by such dog," without proof of *scienter*.<sup>73</sup>

Under general power, an ordinance forbidding circulars, handbills, advertising matter, etc., from being distributed or circulated on the streets or public places was held unreasonable.<sup>74</sup> But in Massachusetts it has been held that, under the power to make all "such salutary and needful by-laws," etc., as deemed necessary, an ordinance prohibiting the carrying on the sidewalk of show boards, placards or signs, etc., for the purpose of display, was reasonable where passed for a populous city, as Boston.<sup>75</sup>

### § 735. Same subject.

An ordinance of the City of St. Louis relating to the duty of the operatives of street cars, which provided that, "conductors shall not allow ladies or children to leave or enter cars while the same are in motion," was sustained against the contention that it was

in or to the smokestack. Amidst the hundreds of devices known or used it would be very difficult, indeed, for the steamboat owner to satisfy the requirements of the ordinance and more difficult to satisfy a jury that he had in fact adopted the best known one in use. A law which inflicts a penalty or punishment ought to be so plainly drawn as to clearly point out the act to be punished. This ordinance fails to do that, and is therefore, we think, unrea-

sonable." *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 160, 50 Am. Rep. 352, 18 N. W. 764.

72. *Waters v. Leech*, 3 Ark. 110.

73. *Commonwealth v. Steffee*, 7 Bush. (Ky.) 161.

74. *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578, 2 L. R. A. 721, 41 N. W. 275. Compare *Philadelphia v. Brahender*, 201 Pa. St. 574, 578, 51 Atl. 374.

75. *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451.

unreasonable, in that it imposed upon the carrier the duty of controlling the acts and liberty of passengers, and that it also imposed an unreasonable duty on the carriers towards those under their care and whom they undertake to carry safely.<sup>76</sup>

An ordinance prohibiting the operation of a merry-go-round within 1,000 feet of any public park in the city, was upheld as a reasonable and constitutional exercise of municipal authority.<sup>77</sup>

A provision of an ordinance imposing a tax of one hundred dollars on packing agents having a place of business or stock within the city, with an additional tax of four hundred dollars if they should sell fresh meat was pronounced unreasonable.<sup>78</sup>

An ordinance conferring a franchise upon a lighting company wherein the local corporation agreed to take all light from the company and pay therefor during the whole period at rates definitely fixed which considerably exceeded prices paid elsewhere under similar circumstances, was held unreasonable.<sup>79</sup>

Further illustrations of the rule appear in the cases in notes,<sup>80</sup> and in the chapters on ordinances relating to police powers,<sup>81</sup> and constitutionality of ordinances.<sup>82</sup>

76. *McHugh v. St. Louis Transit Co.*, 190 Mo. 85, 95, 88 S. W. 853; *Fath v. Tower Grove & Lafayette Ry.*, 39 Mo. App. 447; *Fortune v. Missouri Ry. Co.*, 10 Mo. App. 252.

77. *Scranton City v. Straff*, 28 Pa. Super. Ct. 258.

78. *Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138.

79. The fact that the ordinance granting a lighting franchise has been approved by the electors will not prevent the ordinance being held void for unreasonableness. *Le Feber v. West Allis*, 119 Wis. 608, 97 N. W. 203.

80. Reasonableness of regulations. Board of directors of bank passed resolutions excluding one of its members from an inspection of its books; held unreasonable. "A by-law, to be entitled to the name, must be some regulation which operates on all alike." Per *Savage, C. J.*, in *People ex rel. v. Throop*, 12 Wend. (N. Y.) 183, 186.

Rule denying admission to public school on account of deficient knowledge of grammar, held unreasonable. *Trustees v. People*, 87 Ill. 303.

81. Chapter 25 *post*.

82. Chapter 19 *post*.

## § 736. Ordinances in restraint of trade.

All ordinances having the effect of interfering with or restraining trade or commerce, preventing competition, creating monopolies and depriving persons engaged in traffic and industry from equal opportunities are void;<sup>83</sup> that is, ordinances or by-laws which necessarily in their operation restrain competition and tend to create monopolies or confer exclusive privileges are generally condemned. This subject is fully treated in other parts of this work.<sup>84</sup> So ordinances and contracts limiting or restraining competition for public work are generally held void, notwithstanding the charter or legislative act applicable may not expressly forbid them.<sup>85</sup>

The basic principle sustaining this rule of law is that trade, commerce and industry should be free and unfettered and all who desire to engage therein should be given equal opportunities, and should be controlled by the same reasonable regulations or restrictions which may be deemed necessary or desirable for the public good.

83. *California*. Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916.

*Illinois*. Inman v. Chicago, 78 Ill. 405; Caldwell v. Alton, 33 Ill. 416, 85 Am. Dec. 282.

*Massachusetts*. Com. v. Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

*Minnesota*. St. Paul v. Laidler, 2 Minn. 190, 72 Am. Dec. 89.

*Mississippi*. Kosciusko v. Slomberg, 68 Miss. 469, 24 Am. St. Rep. 281, 9 So. 297.

*New York*. Dunham v. Rochester, 5 Cow. (N. Y.) 462.

*Pennsylvania*. Sayre v. Phillips, 148 Pa. St. 482, 24 Atl. 76.

Ordinances forbidding the sale without license at temporary

stands or tables of "any lemonade, ice cream, cakes, nuts, fruits," etc., held to be in restraint of trade. Barling v. West, 29 Wis. 307, 315, 9 Am. Rep. 576.

84. See Index "Monopolies."

85. *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932; *Elliott v. Pittsburgh*, 6 Pa. Dist. Rep. 455; *St. Louis Quarry & C. Co. v. Van Versen*, 81 Mo. App. 519; *St. Louis Quarry & Cont. Co. v. Frost*, 90 Mo. App. 677; *Adams v. Brenan*, 177 Ill. 194, 52 N. E. 314; *Holden v. Alton*, 179 Ill. 318, 324, 53 N. E. 556, holding that restriction must increase cost of work, to render contract therefor void.

See chapter on contracts and also on public improvements, *post*.

### § 737. Same—illustrative cases.

A few illustrations will be given. Thus an ordinance requiring coal, grain and heavy products sold in the city to be weighed by city weigher, does not fall within the condemnation of the principle, since it is not in restraint of trade, nor does it deprive any one engaged in such business from standing on an exact equality with his competitors.<sup>86</sup> So, in a well-considered Massachusetts case, a by-law was sustained which prohibited those not duly licensed from removing house dirt and offal from the city, against the contention that the regulation was in restraint of trade. Here it was observed: "Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if it is necessary for the good government of society, it is good."<sup>87</sup> Likewise, and ordinance forbidding fast driving on the public ways and thoroughfares is not in restraint of trade, is entirely reasonable, uniform in its operation, and designed to protect life and limb. All regulations of this character are considered in the chapter on police powers.<sup>88</sup>

In an early Illinois case an ordinance which conferred the exclusive right on one firm to slaughter animals was held void, because, in the opinion of the court, it had the effect of restraining competition, creating a monopoly and conferring an exclusive privilege.<sup>89</sup> But in

86. *Davis v. Anita*, 73 Iowa 325, 35 N. W. 244; *O'Malley v. Freeport*, 97 Pa. St. 24.

See ch. 25 *post*, subdivision relating to markets, weights and measures.

87. *In re Vandine*, 6 Pick. (Mass.) 187, 190, 17 Am. Dec. 351.

Compare this and other cases in this section on this subject with cases in subdivision 1, ch. 19 *post*, constitutionality of municipal ordinances.

88. Chapter 25 *post*.

89. *Chicago v. Rumpff*, 45 Ill. 90, 96, 92 Am. Dec. 196.

**Restraint of trade—English cases.** A by-law in absolute restraint of trade is invalid (*Collins v. Wells Corporation*, 1 T. L. R. 328; *Hesketh v. Braddock*, 3 Burr. 1847; *Butchers' Co. v. Morey*, 1 H. Bl. 370; *Shaw v. Poynter*, 2 A. & E. 312; *Clark v. Denton*, 1 B. & Ad. 92; *Clark v. LeCren*, 7 L. J. K. B. 186, 9 B. & C. 52); "not

Missouri an ordinance was sustained as a proper police regulation against the contention that it was in restraint of trade and created a monopoly, which conferred upon certain persons therein named the exclusive privilege of removing all animals and allowing them to boil, steam and render the carcasses of the same on boats outside of the city, and prohibiting all other persons from in any manner interfering or removing or using the carcasses except as specified in the legislative act under whose express authority the ordinance was enacted.<sup>90</sup>

withstanding any custom or by-law, every person in any borough may keep any shop \* \* \* and use every lawful trade," etc. But a by-law in regulation of trade may be perfectly valid (*Frazerkerly v. Wiltshire*, 1 Str. 462; *Freemantle v. Throwsters Co.*, 1 Lev. 229; *Trinity House v. Crisp*, 2 Show. 92; *Pierce v. Bartrum*, Cowp., 469; *Shaw v. Pope*, 2 B. & Ad. 465).

See, as to by-laws regulating sales in markets, *Collins v. Wells Corporation*, *supra*; *Strike v. Collins*, 50 J. P. 741, 55 L. T. 182, 34 W. R. 459; *Scott v. Glasgow Corporation*, A. C. 470, 68 L. J. P. C. 98, 81 L. T. 302, and as to prohibiting hawking and letting chairs on the foreshore except at appointed places, *Gray v. Sylvester*, 61 J. P. 807, 14 T. L. R. 10; *Parker v. Bournemouth Corporation*, 6 J. P. 440, 86 L. T. 449, 18 T. L. R. 372.

A power to regulate a trade does not, however, justify its total prohibition over an important area unless such prohibition is reasonably necessary for the maintenance of order or prevention of a nuisance (*Toronto Corporation v. Virgo*, A. C. 88, 65 L. J. P. C. 4, 73 L. T. 449).

See also *Rossi v. Edinburgh Corporation*, A. C. 21, 91 L. T. 668, *Arnold's Mun. Corp.* (5th Ed., London), pp. 51, 52.

90. Exclusive privilege of removing dead animals. The court, per Wagner, J., observed: "A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservative of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land. But if the regulation or prohibition contains nothing more than the necessary limitations, and is passed in good faith for the purpose of preserving the public health, and abating nuisances, it is not liable to objection. No man has an inalienable right to produce disease, or trade in that which is noxious, and in every society some minor rights are surrendered for the general good. It is perfectly apparent that nothing can be more obnoxious or offensive, or even detrimental to the public health than

Further illustrations appear in the cases in the notes.<sup>91</sup>

the boiling, steaming and rendering the carcasses of dead animals. If the privilege of purchasing such animals was unrestricted and depended on the mere volition of the parties, then no absolute arrangement could be effected by which the sanitary or police regulations could be carried out. Before they were sold, or the price agreed upon by the parties, they would lie and putrify, and produce infection and disease. Therefore the only safe and practicable mode of arresting and destroying the evil is to confine the removal to persons who act under a license or contract, and who are bound to remove the carcasses promptly, and dispose of them in a way and at a place where the health of the inhabitants will not be interfered with or endangered. The act does not molest the owners of such dead animals. They have a right to use the same if they choose to do so, and butchers and pork packers, when they possess the animals, either by purchase or consignment, are allowed the privilege of steaming, boiling and rendering them for their own purposes, and for their own account." *State v. Fisher*, 52 Mo. 174, 177, 178.

91. Illustrations of ordinances in restraint of trade. Ordinance forbidding auction sales on streets, alleys, sidewalks and public grounds, held not to be in restraint of trade. *White v. Kent*, 11 Ohio St. 550, 553, per Scott, C. J.

Ordinance regulating the killing and bleeding of meats is not in

restraint of trade. *Brooklyn v. Cleves*, Hill and Denio Supp. (N. Y.) 231, per Nelson, C. J.

Regulating peddling meat, game, poultry, etc. *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143.

Sale of cider. *Monroe v. Lawrence*, 44 Kan. 607, 27 Pac. 1113.

Storage of petroleum, etc. *Waters-Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863, 17 So. 343.

Reports of street car companies. *St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44, 1 S. W. 305, 14 Mo. App. 221, 58 Am. Rep. 82.

Forbidding slaughtering within city. *Milwaukee v. Gross*, 21 Wis. 241, 91 Am. Dec. 472.

By-laws of guilds, societies and private corporations in restraint of trade have always been condemned.

*California*. *California Steam Nav. Co. v. Wright*, 6 Cal. 253, 65 Am. Dec. 511.

*Illinois*. *American Live Stock Com. Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385.

*Kentucky*. *Sayre v. Louisville Union Benevolent Assn.*, 1 Duv. (Ky.) 143, 85 Am. Dec. 613.

*Minnesota*. *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215, 50 N. W. 1036.

*Missouri*. *Goddard v. Merchants' Exchange*, 78 Mo. 609, 9 Mo. App. 290.

*New York*. *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

*England*. *Green v. Durham*, 1 Burr 127; *Rex v. Sturgeous*, 2 Burr 892; *Cuddon v. Eastwick*, 1 Salk. 193.



§ 738. Ordinances must not unreasonably discriminate—classification.

Ordinances must be fair, impartial and uniform in their operation.<sup>92</sup> “Where privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions.”<sup>93</sup> An ordinance cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another.<sup>94</sup> So an ordinance directing a named person to do specified acts, as, for

92. *California*. Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642.

*Delaware*. Gray v. Wilmington, 2 Marv. 257, 43 Atl. 94.

*Georgia*. Toney v. Macon, 119 Ga. 83, 46 S. E. 80.

*Illinois*. Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

*Indiana*. First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; Citizens Gas, etc. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624; Graffy v. Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

*Kentucky*. Harrodsburg v. Renfro, 22 Ky. L. Rep. 806, 58 S. W. 795, 51 L. R. A. 897; Simrall v. Covington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 9 L. R. A. 556, 29 Am. St. Rep. 398.

*Louisiana*. State v. Mahner, 43 La. Ann. 496, 9 So. 480; First Municipality v. Blineau, 3 La. Ann. 688.

*New Jersey*. Red Star Line Steamship Co. v. Jersey City, 45 N. J. L. 246.

*Pennsylvania*. Frey v. Morristown, 22 Montg. Co. Rep. 118.

*Tennessee*. Whyte v. Nashville, 2 Swan 364.

*Washington*. Spokane v. Macho, 51 Wash. 322, 98 Pac. 755.

*West Virginia*. Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. (N. S.) 602.

*Wisconsin*. Eastern Wisconsin R., etc. Co. v. Hackett, 135 Wis. 464, 115 N. W. 376, 1136.

A constitutional provision that all laws of a general nature shall have uniform operation, does not apply to city ordinances enacted by the city in the exercise of the police power relative to the removal of garbage. In re Zhizhuzza, 147 Cal. 328, 81 Pac. 955.

93. An ordinance regulating slaughtering of animals which confines such business to a small lot, or even a particular block of ground is unreasonable and tends to create a monopoly. Chicago v. Rumpff, 45 Ill. 90, 97, 92 Am. Dec. 196; Hudson v. Thorne, 7 Paige (N. Y.) 261.

94. Tugman v. Chicago, 78 Ill. 405; May v. People, 1 Colo. App. 157, 27 Pac. 1010.

Ordinance dividing territory into two railroad districts, held void. Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, affirming 33 Ill. App. 78.

example, to abate an alleged nuisance, caused by a building, and prescribing a penalty on failure to comply, is void.<sup>95</sup>

All discriminations in ordinances against those of the same class are bad.<sup>96</sup> The regulation must apply to all of a class.<sup>97</sup> No arbitrary distinction between different kinds and classes of business can be sustained, the conditions being otherwise similar.<sup>98</sup> Classification for legislative purposes is permitted, but it must be reasonable. Differences which would serve for classification for some purposes do not always furnish classification for legislation. The difference which will support class legislation must be such as in the nature of things furnishes a reasonable basis for separate laws and regulations.<sup>99</sup> Laws relating to persons and things as a class, and not to persons or things of a class, are common and usually sustained.<sup>1</sup> The law will be held valid if it operates equally upon all subjects within the class for which the rule is applied.<sup>2</sup>

95. *Municipality v. Blineau*, 3 La. Ann. 688; *S. P. Canajoharie v. Buel*, 43 How. Pr. (N. Y.) 155.

96. *Reg. v. Flory*, 17 Ontario Rép. 715; *Reg. v. Johnson*, 38 Up. Can. Q. B. 549.

97. *Re Pirie and Town of Dundas*, 29 Up. Can. Q. B. 401.

98. *State ex rel. v. Ramsey*, 48 Minn. 236, 240, 241, 51 N. W. 112.

99. *State v. Loomis*, 115 Mo. 307, 314, 22 S. W. 350.

1. *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200; *St. Louis v. Weber*, 44 Mo. 547; *Chillicothe v. Brown*, 38 Mo. App. 609; *Kansas City v. Cook*, 38 Mo. App. 660.

2. *Nichols v. Walters*, 37 Minn. 264.

Such laws must embrace all and exclude none whose condi-

tions and wants render such legislation necessary or appropriate to them as a class.

*Colorado*. In *re Eight Hour Law*, 21 Colo. 29, 32, 39 Pac. 323.

*Illinois*. *Covington v. East St. Louis*, 78 Ill. 548.

*Indiana*. *American Furn. Co. v. Batesville*, 139 Ind. 77, 38 N. E. 408.

*Kentucky*. *Shinkle v. Covington*, 83 Ky. 420.

*Minnesota*. *State ex rel. v. Ramsey*, 48 Minn. 236, 240, 51 N. W. 112; *Johnson v. St. Paul & D. R. R.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419.

*New Jersey*. *Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286.

*Nebraska*. *Low v. Rees Printing Co.*, 41 Neb. 127, 138, 59 N. W. 362.

It thus follows that local police regulations are not to be condemned because not specifically aimed at all persons in whatever business engaged, as they may have an express design of reaching certain classes in certain characters of work.<sup>3</sup> Where all persons engaged in the same business (as laundry) within the prescribed limits are treated alike and subject to the same restrictions, the ordinance will be sustained. The rule is thus stated by the Supreme Court of the United States, per Mr. Justice Field: "The specific regulation for one kind of business, which may be necessary for the protection of the public, can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."<sup>4</sup>

### § 739. Same—illustrative cases.

Ordinance regulations respecting the width of tires, etc., of vehicles which except certain vehicles, as those transporting particular merchandise, are void.<sup>5</sup> So ordinance regulations discriminating against particular class of laundrymen, as Chinese, are void.<sup>6</sup> However, as stated, regulations may be validly made applicable only to a class, as, for example, those engaged in conducting laundries, if the classification is reasonable, *e. g.*,

*Wisconsin.* State ex rel. v. Currens, 111 Wis. 431, 87 N. W. 561.

*United States.* Yick Wo. v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

3. Kansas City v. Sutton, 52 Mo. App. 398.

4. Soon Hing v. Crowley, 113

U. S. 703, 708, 709, 5 Sup. Ct. 730, 28 L. Ed. 1145.

5. Reg v. Pipe, 1 Ont. Rep. 43.

6. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, 14 L. R. A. 584, note; In re Tie Loy, 26 Fed. 611; State ex rel. Toi v. French, 17 Mont. 54, 30 L. R. A. 415, 41 Pac. 1078.

the thing to be regulated supplies a reasonable basis for separate laws. Thus an ordinance was sustained which forbids within certain defined limits, washing and ironing in public laundries and wash houses from 10 at night to 6 in the morning. The fact that the ordinance prohibits one kind of business only does not render it objectionable on the ground of discrimination.<sup>7</sup> But an ordinance imposing upon the operation of laundries, outside the fire limits, conditions different and more onerous than those imposed upon other kinds of business in which machinery is used and which are equally dangerous is clearly discriminating and void.<sup>8</sup>

An ordinance providing different rates for license for the sale of goods is discriminating and void.<sup>9</sup> So an ordinance will be held void which discriminates between residents and non-residents respecting the license tax.<sup>10</sup>

So an ordinance is void which discriminates between corporations respecting the location and use of telephone and telegraph poles.<sup>11</sup>

An ordinance granting permission to certain persons to erect a private hospital was sustained in Louisiana, although there was a general valid existing ordinance forbidding such hospitals.<sup>12</sup> An ordinance requiring bicycles to carry lights after dark was held not to discriminate as to other riders of silently running vehicles.<sup>13</sup>

An ordinance requiring railroad companies to keep their tracks watered so as to lay the dust is not partial,

7. *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

8. *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277.

9. *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642.

10. *Nashville v. Althrop*, 5 Cold. (Tenn.) 554; *Jonas v. Gilbert*, 5 Sup. Ct. of Canada 356; *Carrollton v. Bazzette*, 159 Ill. 284,

42 N. E. 837, 31 L. R. A. 522; *Ottumwa v. Zekind*, 95 Iowa 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447.

See chapter on license tax and ordinances relating thereto.

11. *Hannibal v. Mo. & Kansas Telephone Co.*, 31 Mo. App. 23.

12. *Bozant v. Campbell*, 9 Rob. (La.) 411. See *Com. v. Goodrich*, 13 Allen (Mass.) 545.

13. *Des Moines v. Keller*, 116 Iowa 648, 88 N. W. 827.

since "it embraces all who exercise the same right and work the same inconveniences to occupants of houses on the streets."<sup>14</sup> A smoke law was held valid notwithstanding it exempted dwelling houses.<sup>15</sup> So such law exempting dwelling houses was held valid, although it did not cover steamboats and locomotives.<sup>16</sup>

A municipal ordinance limiting the speed of railroad trains was held not invalid because it excepted a certain railroad company, which is in fact only a street car line and not a railroad within the meaning of the law to which the provisions of the ordinance were intended to apply. It appeared that the excepted railroad was not within the same situation and condition as ordinary railroads to which the ordinance was intended to apply.<sup>17</sup>

Numerous illustrations of discriminating ordinances appear in the cases in the note.<sup>18</sup>

14. *City & Suburban Ry. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. 106.

15. *People v. Lewis*, 86 Mich. 273, 37 Am. & Eng. Corp. Cas. 481, 49 N. W. 140.

See § 664, *ante*.

16. *Moses v. United States*, 16 App. Cases, D. C. 428, 50 L. R. A. 532.

17. *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323, writ of error dismissed in 60 Kan. 251, 56 Pac. 133.

18. **Ordinances discriminating.** Same class of business. *May v. People*, 1 Colo. App., 157; 27 Pac. 1010; *In re Jacobs*, 98 N. Y. 98; *Butcher's Union v. Crescent City*, 111 U. S. 746, 757 *Braceville v. Doherty*, 30 Ill. App. 645.

Speed of trains. *Buffalo v. N. Y. etc. R. R. Co.*, 23 N. Y. S. 303, 309, 6 Misc. Rep. 630, 27 N. Y. S. 297.

Fixing loads for teams, etc. *Kansas City v. Sutton*, 52 Mo. App. 398.

Discrimination as to religion. *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553.

In location of livery stable. *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 53 Am. St. Rep. 325, 35 L. R. A. 84, reversing 58 Ill. App. 539.

Ordinance forbidding the casting of paper, hand bills and advertising matter on streets and private hallways which excepted newspapers and addressed envelopes, held valid. *Philadelphia v. Brabender*, 201 Pa. St. 574, 578, 51 Atl. 374.

Miscellaneous illustrations:

*California.* *Ex parte Haskell*, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *Ex parte Chin Yan*, 60 Cal. 78.

*Illinois.* *Zanone v. Mound City*, 103 Ill. 552.

*Indiana.* *Citizens' Gas & Mfg. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

*Louisiana.* *Baton Rouge v. Cremonini*, 36 La. Ann. 247; *De Ben v. Gerard*, 4 La. Ann. 30; *Municipality v. Blineau*, 3 La. Ann. 688.

*Missouri.* *Kansas City v. Richardson*, 90 Mo. App. 450.

*Montana.* *Bozeman v. Cadwell*, 14 Mont. 480, 36 Pac. 1042.

*New Jersey.* *State v. East Orange*, 41 N. J. L. 127; *Red Star Steamship Co. v. Jersey City*, 45 N. J. L. 246.

*United States.* *Richmond, etc. Railroad v. Richmond*, 96 U. S. 521, 24 L. Ed. 734, affirming 26 Gratt. 83.

An ordinance that applies to the entire city is not special legislation. *Foster v. Board of Police Comrs.*, 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763.

An ordinance requiring a particular street car company to sell tickets on its cars does not contravene the principle that ordinances shall be general and impartial in their operation, as such principle has no application to ordinances originating by virtue of a reservation in a franchise which is in its essence a contract. *Detroit v. Ft. Wayne & B. I. Ry. Co.*,

95 Mich. 456, 35 Am. St. Rep. 580, 20 L. R. A. 79, 54 N. W. 958.

The fact that an ordinance is not properly enforced against every one who violates it does not render it discriminative as, for example, an ordinance forbidding the use of sidewalks for the display of merchandise. *Denver v. Girard*, 21 Colo. 447, 42 Pac. 662.

An ordinance requiring certain water consumers to install expensive meters held invalid. *State v. Jersey City*, 45 N. J. L. 246.

An ordinance imposing burdens on some that are not imposed on others engaged in the same business will not be sustained. *Simrall v. Covington*, 90 Ky. 444, 12 Ky. L. Rep. 404, 14 S. W. 369, 9 L. R. A. 556, 29 Am. St. Rep. 398.

An ordinance prohibiting the bringing into the city of second hand clothing, or exposing the same for sale therein, without proof of its non-infection. *Kosciusko v. Slomberg*, 68 Miss. 469, 9 So. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281.

For further illustrations, see chapter 19, constitutionality of municipal ordinances. Chapter 25, municipal police powers and ordinances relating thereto and chapter as to license tax and ordinances relating thereto.

## CHAPTER 19.

## CONSTITUTIONALITY OF ORDINANCES.

## 1. IN GENERAL.

## 2. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

## 3. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

## 1. IN GENERAL.

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740. Ordinances must be constitutional—enumeration.

741. Ordinances in derogation of common rights.

742. Same—use of private property.

743. Same—use of public property—streets.

744. Taking or damaging private property.

745. Oppressive regulation.

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747. Discriminating on account of class, race or religious sect, etc.

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750. Personal liberty — drunkenness.

751. Mode of trial.

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## 2. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

Sec.

753. Ordinances cannot impair the obligation of contracts.

754. Ordinance as "Law."

755. Ordinance as contracts.

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757. Question is for decision of United States Supreme Court.

758. Taxation by municipal corporation of its own bonds.

759. Ordinances granting franchises as contracts.

760. Same — imposing additional burdens.

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762. Franchise contracts authorized by state.

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764. Contracts of contractors for public work.

765. Same—rights vested in the contractor.

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767. Same subject.

768. Interest on special tax bills as part of obligation.

769. When new remedy controls.

770. When old law to be followed.

### 3. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

Sec.	Sec.
771. Ordinances cannot interfere with or regulate interstate or foreign commerce.	781. Discriminating license tax void.
772. Meaning of term "commerce."	782. License tax under police power.
773. No analogy between the power of taxation and the regulation of commerce.	783. Same—telephone and telegraph poles in streets.
774. License tax on those engaged in exporting and importing.	784. Taxation of property employed in inter-state or foreign commerce.
775. License tax for privilege of selling goods, etc.	785. License tax on foreign corporations.
776. Same—discrimination is not the test.	786. Cannot regulate or tax operations or objects of inter-state or foreign commerce.
777. Same—where goods sold are in the state.	787. Same—property in transit.
778. Same—same—peddlers.	788. Local police regulations.
779. Personal contracts—occupation tax.	789. Same—scope of police power.
780. License tax on brokers, agents, etc., engaged in inter-state commerce.	790. Same subject — illustrative cases.
	791. Same—quarantine laws.
	792. Same subject.
	793. Harbor and local police regulations.

### 1. IN GENERAL.

#### § 740. Ordinances must be constitutional—enumeration.<sup>1</sup>

The restrictions imposed by the Constitution of the United States and that of the state which limit the power

1. An ordinance which conflicts with the constitution is void. *Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *McGrath v. Chicago*, 24 Ill. App. 19; *New Orleans v. Mechanics and Traders' Ins. Co.*, 25 La. Ann. 389.

General rule to test the constitutionality of a law. The general proposition is well established that no law will be declared

unconstitutional unless clearly so and every reasonable intendment will be made to sustain it.

*Arkansas.* *State v. Byles* (Ark., 1910), 126 S. W. 94.

*Illinois.* *People v. Chicago*, etc. R. Co., 247 Ill. 458, 93 N. E. 298.

*Missouri.* *Wells v. Mo. Pac. R.* R., 110 Mo. 286, 19 S. W. 530; *State ex rel. v. Simmons Hdw. Co.*, 109 Mo. 118, 18 S. W. 1125; *State*



of the state, in like manner limit the authority of the municipal corporation. Therefore the local corporation cannot legally pass:

First, an *ex post facto* ordinance, or one retrospective in its operation;<sup>2</sup> or,

*ex rel. v. County Court*, 102 Mo. 531, 15 S. W. 79; *State ex rel. v. Mo. Pac. R. R.*, 92 Mo. 137, 6 S. W. 862; *State v. Hope*, 100 Mo. 347, 13 S. W. 940; *State v. Pond*, 93 Mo. 606, 618, 6 S. W. 469; *Kelly v. Meeks*, 87 Mo. 396; *State v. Addington*, 77 Mo. 110.

*New York.* *Reid v. Stevens*, 126 N. Y. S. 379, 70 Misc. Rep. 177; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285; *People v. Angle*, 109 N. Y. 564, 17 N. E. 413; *People v. West*, 106 N. Y. 293, 12 N. E. 610; *Bertholf v. O'Reilly*, 74 N. Y. 509.

*Pennsylvania.* *Erie & N. E. R. R. v. Casey*, 26 Pa. St. 287; *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68.

*Texas.* *Ashford v. Goodwin* (Tex., 1910), 131 S. W. 535.

*Wisconsin.* *State v. Daniels*, 143 Wis. 649, 128 N. W. 565.

*Washington.* *State v. Superior Court* (Wash., 1910), 111 Pac. 233; *In re Seattle* (Wash., 1910), 110 Pac. 29.

Where a law is susceptible of two interpretations, one of which will sustain its constitutionality and the other defeat it, the former will be adopted. *People v. Joyce*, 246 Ill. 124, 92 N. E. 607; *State v. Louisville, etc. R. Co.* (Miss., 1910), 53 So. 454; *Knox v. Emerson* (Tenn., 1910), 131 S. W. 972; *Georgia Fire Ins. Co. v. Cedertown* (Ga., 1910), 67 S. E. 410; *Simon v. Schmitt*, 122 N. Y.

S. 421, 137 App. Div. 625; *State ex rel. v. Clayton*, 226 Mo. 292, 126 S. W. 506.

2. U. S. Const., art. 1, § 10.

**Retrospective ordinances.** "No laws can operate retrospectively unless they are explanatory of the statutes, or declaratory of the common law. With these exceptions, statutes and ordinances will always be construed as applying their principles to cases in future, or subsequent to their enactment." Rule applied to an ordinance relating to assessment. *Howard v. Savannah*, Thos. U. P. Charlton (S. C.) 173.

Retroactive effect may be given to an ordinance unless constitutional rights are infringed. Thus an ordinance passed after a municipal election, may create a tribunal and prescribe the mode of procedure for determining election contests growing out of it. *State v. Johnson*, 17 Ark. 407.

**Ordinance not retrospective.** *Willow Springs v. Withaupt*, 61 Mo. App. 275.

As to binding effect on street railway company not in existence when the ordinance was enacted, see *Thompson v. Citizens' St. Ry.*, 152 Ind. 461, 53 N. E. 462.

**Retrospective ordinance is viewed with disfavor.** *Carson v. Bloomington*, 6 Ill. App. 481; *Hansen v. Meyer*, 81 Ill. 321; *In re Fuller*, 79 Ill. 99.

Second, an ordinance impairing the obligation of contracts;<sup>3</sup> or,

Third, an ordinance laying imposts or duties on imports or exports;<sup>4</sup> or,

Fourth, an ordinance laying a "duty of tonnage;"<sup>5</sup> or,

"The rule against retroactive legislation, in the absence of constitutional provisions forbidding it, does not apply unless it interferes with contract or vested rights." *Augusta v. Waterville* (Me., 1910), 76 Atl. 707.

"Upon principle every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past, must be deemed retrospective." Per Justice Story in *Society, etc. v. Wheeler*, 2 Gall. 105, 139 (Fed. Cas. 13,156).

This definition has been adopted in *Raisden v. Holden*, 15 Ohio St. 207; *Sturges v. Carter*, 114 U. S. 511, 5 S. Ct. 1014, 29 L. Ed. 240, and *Ross v. Lettice*, 134 Ga. 866, 68 S. E. 734.

3. Const. of U. S., art. 1, § 10.

*United States.* *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

*Georgia.* *Haywood v. Savannah*, 12 Ga. 404.

*Illinois.* *Illinois Conference Female College v. Cooper*, 25 Ill. 148.

*Indiana.* *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 49 Am. St. Rep. 183, 39 N. E. 433.

*Iowa.* *Davenport, etc. Co. v. Davenport*, 13 Iowa 229.

*Missouri.* *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460.

*New York.* *Coates v. New York*, 7 Cow. (N. Y.) 585.

*Pennsylvania.* *Western Saving Society v. Philadelphia*, 31 Pa. St. 175.

*Virginia.* *Davenport v. Richmond*, 81 Va. 636, 59 Am. Rep. 694.

§ 753 *et seq. post.*

4. Imposts or duties on imports or exports. "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." U. S. Const., art. I, § 10, par. 2; *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579.

5. Const. of U. S., art. I, § 10, par. 3.

§ 405 *ante.*

Fifth, an ordinance regulating interstate or foreign commerce;<sup>6</sup> or,

Sixth, an ordinance abridging the privileges or immunities of citizens of the United States, or denying to any person within the municipality "the equal protection of the laws," as discriminating against non-residents in occupation and license taxes, etc.;<sup>7</sup> or,

6. "The Congress shall have power to regulate commerce with foreign nations and among the several states." U. S. Const., art. I, § 8, clause 3.

§ 771, *et seq. post.*

7. Ordinance cannot abridge privileges or immunities of citizens. "The citizens of each state shall be entitled to the privileges and immunities of citizens in the several states." U. S. Const., art. II, § 2.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any citizen of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., 14th Amendment; *Ah Kow v. Nunan*, 5 Sawyer (U. S.) 552.

Corporations are not within the protection of this constitutional provision. *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787.

"Equal protection of the law." *In re Sam Kee*, 31 Fed. 680; *State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *State v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948, 54 N. W. 1104. Equal protection of the law provision of the con-

stitution does not forbid classification. *Texas Cent. R. Co. v. Hannay Frerichs & Co.* (Tex. Civ. App. 1910), 130 S. W. 250.

Ordinance requiring bicycles to carry light after dark is constitutional. *Des Moines v. Keller*, 116 Iowa 648.

§ 781 *post.*

Ordinance forbidding keeping private markets within specified distance from public market, held constitutional. "The case is too plain for discussion," per Mr. Justice Gray, in *Natal v. Louisiana*, 139 U. S. 621, 624, 11 Sup. Ct. 626, 35 L. Ed. 288, affirming *State v. Natal*, 39 La. Ann. 439, 1 So. 923.

Ordinance requiring that stages used for the transportation of passengers should be licensed, and providing that persons violating it might be fined \$100, or imprisoned ninety days, does not deny to the drivers of such stages the equal protection of the laws, or subject them to cruel and unusual punishment. *Belmar v. Barkalow*, 67 N. J. L. 504, 52 Atl. 157.

An ordinance limiting the speed of vehicles is not void as denying equal protection of the law. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724.

Ordinances prohibiting the keeping of pool or billiard rooms for

Seventh, an ordinance depriving any person of his liberty, or authorizing the taking of private property, without due process of law;<sup>8</sup> or,

hire is not invalid for failing to prohibit the keeping thereof for free or for private use. *Cole v. Culbertson*, 86 Neb. 160, 125 N. W. 287.

8. U. S. Const., 14th Amendment; *Coates v. New York*, 7 Cow. (N. Y.) 585.

**Liberty and due process of law.** Removal of dead animals. *River Rendering Co. v. Behr*, 77 Mo. 91.

**License of non-resident vehicles.** *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440.

**Improvement ordinances—failure to provide for notice and hearing.** *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, affirming 74 Fed. 997; *Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43; *Ulman v. Baltimore*, 72 Md. 587, 20 Atl. 141, 21 Atl. 709.

Ordinance requiring all printing to bear union label violates the 14th Amendment, as it deprives those not using the label from pursuing their vocation as far as printing is concerned. *Marshall v. Nashville*, 109 Tenn. 495, 71 S. W. 815.

**"Due process of law" and "equal protection of the law."**

**United States.** *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 4 L. Ed. 666, reversing 87 Tex. 19, 26 S. W. 985;

*Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485; *O'Neil v. Vermont*, 144 U. S. 323, 361, 12 Sup. Ct. 693, 36 L. Ed. 450; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; *Santa Clara County v. So. Pac. R. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118, affirming 18 Fed. 385, 9 Sawy. 165; *Yick Wo. v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, reversing 26 Fed. 471, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, reversing 11 W. Va. 745, 27 Am. Rep. 606; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, affirming 27 La. Ann. 20; *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394, affirming 22 La. Ann. 545.

**California.** *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 49 Am. St. Rep. 93.

**Georgia.** *Cosgrove v. Augusta*, 103 Ga. 835, 31 S. E. 445, 68 Am. St. Rep. 149.

**Illinois.** *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707.

**Louisiana.** *Waters-Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863, 17 So. 343.

**Mississippi.** *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143.

**Ohio.** *Branahan v. Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457.

**Forfeiture of animals running at large**, § 714 *ante*.

Eighth, an ordinance in derogation of other constitutional and recognized common rights, relating to the liberty or property of the individual;<sup>9</sup> or,

Ninth, an ordinance in conflict with a provision of the constitution of the state. Most of the state constitutions contain various specific restrictive provisions of the powers of municipal corporations. Thus they are forbidden by ordinance or otherwise from loaning their credit, granting money in aid of, or to, individuals or corporations, or becoming stockholders in corporations or associations; conferring exclusive franchises upon individuals or corporations to lay down railroad tracks in streets, supply light, water or other necessities or conveniences to the inhabitants; authorizing irrevocable grants of special privileges or immunities; granting extra compensation, fee or allowance to a municipal officer, agent, servant or contractor after service has been rendered or the contract has been entered into and performed in whole or in part; authorizing the payment of any claim created against the city under contract made without express warrant of law; legalizing the unauthorized or invalid acts of municipal officers, agents, servants or contractors; changing the compensation of a municipal officer during his term of office; extending the term of office, etc.<sup>10</sup>

9. § 741 *et seq. post.*

Right of trial by jury, see chapter on action to enforce police ordinances, subdivision 4.

Ordinance forbidding sale of specified newspaper, held unconstitutional. *Ex parte Neill*, 32 Tex. Crim. Rep. 275, 40 Am. St. Rep. 776.

Changing rule of evidence in criminal charge. In *re Wong Hane*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138.

10. §§ 185, 186, 393 to 395 *ante*.

Loaning money on credit by providing payment of interest on warrants for public work. *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29.

Forbidding removal of police officers except for cause is constitutional. *Roth v. State ex rel.*, 158 Ind. 242, 63 N. E. 460.

Changing salary during term. *Wadsworth v. Maysville*, 24 Ky. L. Rep. 312, 68 S. W. 391; *Grenada v. Wood*, 81 Miss. 308, 33 So. 173.

**§ 741. Ordinances in derogation of common rights.**

Many cases have declared the ordinance void because found to be in derogation of common rights. Generally speaking, such rights are understood to be rights which are common to all. In sustaining an ordinance which imposed a penalty upon retail grocers for keeping spirituous liquors on their premises for the purpose of retailing the same, without a license, in an early case, the Supreme Court of South Carolina observed: "That which is not prohibited may be lawfully done, but that which is prohibited by law, no one has a right to do. If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it, any man might, and it might therefore be said to be a common right; but when the law prohibited it, it was no longer a common right. Before the ordinance \* \* \* it was the common right of every citizen to keep spirituous liquors in his retail shop or anywhere else at his pleasure; but when it was found by experience that this was an easy method of violating the law prohibiting shopkeepers from selling spirits to slaves and cab loafers about town, and an ordinance was passed to prohibit such shopkeepers from keeping it in their shops and in secret back rooms adjoining, it was no longer a common right, but a legal restraint imposed on a few for the benefit of the many."<sup>11</sup>

The sovereign power in a community may, and ought to, prescribe the manner of exercising rights over property, since it is for the better protection and enjoyment of that absolute dominion which the individual claims. The power rests upon the implied right and duty of the supreme power to protect all by proper restrictions, to the end that, on the whole, the benefit of all is promoted. Every public regulation in a city may, and does, to a certain extent, limit and restrict the absolute right that

11. *Charleston v. Ahrens*, 4 Strob. (S. C.) 241, 257, per Evans, J.

existed previously, but this cannot be considered an injury. On the other hand, the individual is presumed to be benefited. If it should be determined that the corporate authorities have not the right to regulate the use of private property in the city, so as to prevent its proving pernicious to the health and comfort of the citizens generally, or injurious to certain classes of property and business within the city, it would strike at the very foundation of all police regulations. Every right, from an absolute ownership in property down to a mere easement, is purchased and holden, subject to the restriction that it shall be exercised so as not to injure, inconvenience or discommode others.<sup>12</sup>

#### § 742. Same—use of private property.

An ordinance, forbidding washing and ironing in public laundries and wash houses, within defined limits, from 10 at night to 6 in the morning, was held to be a pure

12. *Baker v. Botton*, 12 Pick. (Mass.) 184, 193; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 1. c. 604, 605; *Green v. Savannah*, 6 Ga. 1; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; *Warren v. Greer*, 117 Pa. St. 207, 11 Atl. 415; *Ritchie v. Wyman*, 244 Ill. 509, 91 N. E. 695; *People v. Bowes-Allegretti Co.*, 244 Ill. 557, 91 N. E. 701.

**Police regulations.** Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants, are comprehensively styled police laws, and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconsti-

tutional (*Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 92 N. E. 643; *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859), though no provision is made for compensation for such disturbances. The principle was applied to an ordinance relating to use of water, which in effect compelled the water taker to bear the expense of putting in the meter. *Hill v. Thompson*, 16 Jones & Spencer (48 N. Y. Super. Ct. Rep. 481, 489).

Prevention of fraud is within the police power. *State v. Co-operative Store Co.* (Tenn., 1910), 131 S. W. 867.

Ordinance cannot prohibit soliciting patrons. *Thomas v. Hot Springs*, 34 Ark. 553, 36 Am. Rep. 24.

See chapter 25, municipal police powers and ordinances relating thereto, *post*.

police regulation within the competency of a municipality possessed of the ordinary powers.<sup>13</sup> But an ordinance passed by a corporation, possessing general powers incident to such corporations and without special charter authority, which required stores (except drug stores, for the sale of drugs and medicines) to be closed at 7:30 in the evening, except on Saturdays, was declared void in North Carolina, because oppressive and against common rights, as it deprived such storekeepers of their natural right, free use and enjoyment of property, used in such way as not to interfere with the rights of others.<sup>14</sup> So in the same state, an ordinance passed by a corporation possessing only general powers, forbidding one who sells liquor from occupying his own premises between 10 p. m. and 4 a. m., was condemned for the same reason.<sup>15</sup> So under the general power "to regulate the wharves on the shore of the Ohio River adjoining said city," the city cannot by ordinance define the line of high-water mark and declare the erection of buildings below such line a nuisance and impose a fine on persons erecting such buildings on their own land.<sup>16</sup>

In North Carolina an ordinance providing that no person should erect or alter any building without first ob-

13. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, per Mr. Justice Field, affirmed in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

14. *State v. Ray*, 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634.

15. **Use of private property—void regulation.** "If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need

nothing more than the enactment of a law creating them, with the incidental grant embodied in § 3799 of the Code, to give them equal authority with the legislature itself, to restrict and regulate the right of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given by the statute and its attempted exercise was therefore invalid." *State v. Thomas*, 118 N. C. 1221, 1225, 1226, 24 S. E. 535.

16. *Evansville v. Martin*, 41 Ind. 145.



taining permission of the board of aldermen was held void as being unreasonable.<sup>17</sup> But it may be stated that ordinances of this nature are generally sustained as being proper subjects within municipal police regulations.

This subject is more fully treated in the chapter on municipal police powers and ordinances relating thereto.<sup>18</sup>

### § 743. Same—use of public property—streets.

It was early held in Connecticut that a by-law, which restricted the privilege of fishing in a navigable river within the corporate limits to the inhabitants of the town, was void because in derogation of the common rights of the non-residents.<sup>19</sup>

Ordinances which permit the obstruction of public streets, in whole or in part, rendering them impassable, or in a measure useless to the public are generally condemned. The city is the trustee of all public ways whether the fee is in the city or in the abutting property owners. The fact that the fee of the street is in the city does not authorize the municipal authorities to divert it from its legitimate purpose as a street. Hence, an ordinance authorizing a bridge approach in a public street which obstructs it is void.<sup>20</sup> So an ordinance authorizing the construction of a stairway, occupying a portion of a public alley, to the detriment of the traveling public, is void.<sup>21</sup>

Ordinances relating to the use of streets and public ways are treated in the chapters on police powers, municipal highways, streets, etc., and franchises.

17. *State v. Tenant*, 110 N. C. 391; *Willard v. Killingworth*, 8 Conn. 247.

18. Chapter 25 *post*.

19. *Hayden v. Noyes*, 5 Conn.

20. *Stack v. East St. Louis*, 85 Ill. 277, 28 Am. Rep. 619.

21. *Pettis v. Johnson*, 56 Ind. 139.

### § 744. Taking or damaging private property.

Notwithstanding the corporation has express power to protect the health, to declare and abate nuisances, etc., ordinances which, in effect, declare that all dead animals found in the city, not killed for human food, nuisances immediately after death, and making it unlawful for any person other than the city contractor to remove and dispose of them, have been held unreasonable, because the owner was denied the right of removal and also the right to realize any value the animal might have.<sup>22</sup>

Requiring an owner of real estate to pay for water furnished by a municipality to his tenants is not a taking of property without due process of law.<sup>23</sup>

Laws providing for confiscation and summary destruction of property which can be used only for an unlawful purpose are constitutional.<sup>24</sup> So law authorizing the confiscation of property kept or used in violation of law, and the destruction thereof after notice and judicial determination are constitutional.<sup>25</sup> And such laws which fail to provide for notice or judicial determination, have been held constitutional on the ground that an adequate remedy for a wrongful destruction thereof can be had by action for damages.<sup>26</sup>

An ordinance authorizing the seizure, without warrant, of milk for the purpose of inspection is a valid exercise of police power.<sup>27</sup>

22. *State v. Morris*, 47 La. Ann. 1660, 18 So. 710; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6.

23. *East Grand Forks v. Lucks*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198.

24. *Mullen v. Mosely*, 13 Ida. 457, 90 Pac. 986, 12 L. R. A. (N. S.) 394.

25. *McConnell v. McKillop*, 71 Neb. 712, 99 N. W. 305, 65 L. R.

A. 610; *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275, 65 L. R. A. 616.

26. *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S. W. 257.

27. *St. Louis v. Liessing*, 190 Mo. 464, 1 L. R. A. (N. S.) 918, 89 S. W. 611.

An ordinance designating limits outside of which no woman of lewd character shall dwell, containing a proviso that nothing therein shall be so construed as to authorize such women to occupy a house in any portion of the city, and containing no restriction respecting the legal right to restrain a private nuisance, was held by the Supreme Court of the United States a valid exercise of police power which does not invade the rights of property owners in or adjacent to the prescribed limits in violation of the Federal Constitution, notwithstanding the pecuniary value of their property may be depreciated as a result.<sup>28</sup>

Although pointed out in a prior section it may be mentioned here that property rights of the citizens<sup>28a</sup> of a state are always held and enjoyed subject to the reasonable exercise of the police power of the state.<sup>29</sup>

### § 745. Oppressive regulations.

Under general power to regulate the sale of liquor by druggists, a provision in an ordinance exacting reports quarterly of the kind and quantity sold, when and to whom sold, and on whose prescription or assurance, under penalty, was held unreasonable.<sup>30</sup> So an ordinance regulating merchants, engaged in buying and re-packing loose cotton, which required them to give bond and to keep in a book specially provided for the purpose a daily record of the sellers of loose cotton and the quantity of each purchase, which book was required to be kept at all times open to the inspection of the police, was held

28. *L'Hote v. New Orleans*, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899. See § 475 *post*.

28a. § 741 *ante*.

29. *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695; *People v. Bowes-Allegretti Co.*, 244 Ill. 557, 91 N. E. 701.

See chapter 25 *post*.

30. "The private citizen, in-

vested with no public office or employment, should not be subjected to such inquisition. \* \* \*

This section is an invasion of the sanctity of private business, and ought not to be tolerated." *Clinton v. Phillips*, 58 Ill. 102, 104.

Regulating the sale of intoxicating liquor, see chapter 25 *post*, subdivision 4.

unreasonable and void, in the absence of special legislation.<sup>31</sup> But an ordinance of Chicago requiring detailed daily reports to the police of all personal property received on deposit by pawnbrokers was held not oppressive or tyrannical, but a reasonable police regulation.<sup>32</sup>

Municipalities may enact ordinances fixing a standard of purity for milk and the test by which the analysis shall be made. Such regulations are not unreasonable and oppressive.<sup>33</sup> This topic is treated fully elsewhere.<sup>34</sup>

The question as to interfering with what are known as common rights has been variously answered by the decisions.<sup>34a</sup> Thus in North Carolina an ordinance imposing a tax on all persons engaged in the particular business, whether residents or not, was held valid against the contention that it was an interference with common rights.<sup>35</sup> But in Missouri a tax on wagons of non-residents, engaged in hauling into and out of the city, was held void.<sup>36</sup>

An ordinance requiring express companies delivering intoxicating liquors within the city to pay a specified annual license fee is not authorized by a power to enact proper ordinances for the security of the health, peace, order and good government of the city.<sup>37</sup>

The prevailing rule is that the power to declare municipal ordinance passed pursuant to express legislative authority void, on the ground that it is unreasonable,

31. *Long v. Shelby Co. Taxing District*, 7 Lea (Tenn.) 134.

32. *Lauder v. Chicago*, 111 Ill. 291.

See chapter 25 *post*, subdivision 6.

33. *St. Louis v. Liessing*, 190 Mo. 464, 1 L. R. A. (N. S.) 918, 89 S. W. 611; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492, 1 L. R. A. (N. S.) 926.

34. Chapter 25 *post*, subdivision 5.

34a. See § 741 *ante*.

35. *Edenton v. Capeheart*, 71 N. C. 156.

36. *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440.

37. *Southern Express Co. v. R. M. Rose Co.*, 124 Ga. 581, 53 S. E. 185.

arbitrary and oppressive will be exercised by the court, only in extreme cases.<sup>38</sup>

This subject is more fully explained and illustrated in other parts of this work.<sup>39</sup>

### § 746. Relating to individual liberty.

An ordinance authorizing certain officers to arrest and detain until the extinguishment of a fire, any person refusing to obey their direction, is unconstitutional for the reason that it deprives those arrested of their liberty without due process of law or a trial by jury.<sup>40</sup> An ordinance authorizing police officers to make arrests without a warrant for breach of ordinances, not committed in their presence, is void.<sup>41</sup> But if the ordinance is violated in the officer's presence and view he may arrest without warrant whether the ordinance so authorized or not.<sup>42</sup>

The Supreme Court of Texas held an ordinance void as being unreasonable in that it interfered with common rights, which forbade the renting of private property to lewd women or to any person for their use. This was held to be a proscriptive denial of shelter to that class, and therefore null and void and in contravention of common rights.<sup>43</sup>

So an ordinance requiring a license for the doing of scavenger work in the city, and providing that all persons proposing to do such work must submit bids, and that the board of health shall decide who are competent

38. Chesapeake & Ohio R. Co. v. Maysville, 24 Ky. L. Rep. 615; 69 S. W. 728; Louisville, etc. R. Co. v. Louisville, 141 Ky. 131, 132 S. W. 184.

See § 730 *et seq. ante*.

39. Chapter 18, Reasonableness of Ordinances, chapter on License Tax, chapter 25, Police Regulations.

40. Judson v. Reardon, 16 Minn. 431.

41. Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205.

42. Scircle v. Neeves, 47 Ind. 289; Nealis v. Hayward, 48 Ind. 19.

See chapter on actions to enforce police ordinances, *post*.

43. Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

bidders, and fixing the times at which closets shall be cleaned, is void as in derogation of common right, where no necessity is shown therefor, and the effect would be to prohibit property owners themselves from removing the refuse from their own premises. Respecting the effect of the ordinance the court said: "This is clearly an interference with a natural right, and while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions."<sup>44</sup>

Ordinances making it penal to carry concealed weapons have been judicially sanctioned as proper police regulations. Clearly the citizen has no natural right to do the thing forbidden.<sup>45</sup>

An ordinance of Boston providing that no person should, except by permission of the committee of the city council, deliver a sermon, lecture, address or discourse on the commons or other public grounds, was held constitutional.<sup>46</sup> And in Michigan an ordinance forbidding the delivery of public address within half a mile of the city hall, without a license from the mayor, was sustained as reasonable.<sup>47</sup>

In the absence of express power, an ordinance declaring that any person bearing the reputation of a prostitute shall be fined, if residing or found within the

44. *State v. Hill*, 126 N. C. 1139, 50 L. R. A. 473, 36 S. E. 326.

45. *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38; *In re Cheney*, 90 Cal. 617, 27 Pac. 436; *Ope-lousas v. Giron*, 46 La. Ann. 1364, 16 So. 190; *St. Louis v. Vert*, 84 Mo. 204.

See ch. 25 *post*, subdivision 6.

46. *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *Davis*

*v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. 731; *Commonwealth v. Davis*, 162 Mass. 510, 26 L. R. A. 712, 39 N. E. 113; *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *Wilson v. Eureka*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603.

47. *Love v. Recorder's Court*, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618.

corporate limits, is void.<sup>48</sup> But an ordinance which forbids any prostitute from being on the streets of a city between the hours of 7 p. m. and 4 a. m., without any reasonable necessity therefor was sustained as a valid exercise of the police power, under a statute giving authority to "restrain and punish prostitutes."<sup>49</sup>

General power to preserve the peace and protect the good morals of the community has been held not to authorize a curfew ordinance making it a misdemeanor for minors, unaccompanied by their parents or guardians, to be on the streets after 9 p. m., unless for the purpose of searching for a physician.<sup>50</sup>

An ordinance imposing a fine upon persons in possession of premises on which liquor is sold in violation of law, not limited to persons having knowledge of, or consenting to, the act is unconstitutional.<sup>51</sup>

There is no constitutional right to sell intoxicating liquors by retail and the business may be restricted as the law-making power may see fit, or it may be prohibited altogether.<sup>52</sup>

There is no vested right to conduct a billiard or pool room for hire where such business is prohibited by ordinance under authority delegated to the municipality by the state.<sup>53</sup>

48. Buell v. State, 45 Ark. 336; Paralee v. Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. 654.

Compare Shafer v. Mumma, 17 Md. 331, 79 Am. Dec. 656, where a like ordinance was sustained, passed under express power.

49. Dunn v. Com., 20 Ky. L. 1649, 43 L. R. A. 701, 49 S. W. 813.

Compare cases in subdivision 4, of chapter 25 *post*.

50. Ex parte McCarver, 39 Tex. Crim. Rep. 448, 46 S. W. 936, 42 L. R. A. 587, relying on St. Louis v. Fitz, 53 Mo. 582; Chicago v.

Strotter, 136 Ill. 430, 26 N. E. 359.

51. Campbellsburg v. Odewalt, 24 Ky. L. R. 1717, 72 S. W. 314, 60 L. R. A. 723.

52. Gordon v. Corning (Ind., 1910), 92 N. E. 59; Darby v. Pence, 17 Idaho 697, 107 Pac. 484; New Orleans v. Smythe, 116 La. 685, 6 L. R. A. (N. S.) 722; Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. 13.

See chapter 25 *post*, subdivision 4.

53. Cole v. Culbertson, 86 Neb. 160, 125 N. W. 287.

See chapter 25 *post*, subdivision 4.

An ordinance imposing a penalty of fine and imprisonment on persons who run vehicles without a license is not unconstitutional as authorizing imprisonment for "debt."<sup>54</sup>

An ordinance forbidding the smoking of cigarettes within the corporate limits was declared unconstitutional in Kentucky as an unreasonable invasion of personal liberty.<sup>55</sup>

### § 747. Discriminating on account of class, race or religious sect, etc.

Hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the Constitution of the United States. That amendment declares that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law. "This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities."<sup>56</sup>

Municipal ordinances applying alike to all persons engaged in a given pursuit, without distinction as to nationality, creed, etc., are not in violation of the Federal Constitution, nor of any treaty or law of the United States.<sup>57</sup> But an ordinance to regulate the carrying on

54. *Chicago v. Morrell*, 247 Ill. 383, 93 N. E. 295. See, also, *State v. Thompson* (S. D., 1910), 125 N. W. 567.

55. *Hershberg v. Barbourville*, (Ky., 1911), 133 S. W. 985.

56. *Ho Ah Kow v. Nunan*, 5 Sawyer (U. S.) 552, 562, 12 Fed. Cas. No. 6546, per Mr. Justice Field.

57. Ordinances regulating laundries wherein the question of dis-

crimination against Chinese is fully treated. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *In re Yick Wo*, 68 Cal. 294, 305, 9 Pac. 139; *Ex parte Mount*, 66 Cal. 448, 475, 6 Pac. 78; *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728; *Ex parte Wolters*, 65 Cal. 269, 3 Pac. 894.



of public laundries which confers upon the municipal officers arbitrary power to give or withhold consent as to persons or places, who and where they shall carry on the business, is void and violates the provisions of the Federal Constitution, especially if it makes arbitrary and unjust discrimination founded on difference of race.<sup>58</sup>

An ordinance which required the arrest of any free negro found on the street after ten o'clock and lodge him in the calaboose, there to remain until the next morning, and imposing a fine of ten dollars on such offender, was declared "high-handed and oppressive, and enacted by the corporation without any authority. It is an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime, and to exact a penalty therefor both by fine and imprisonment, without trial before any tribunal."<sup>59</sup>

So ordinances conferring upon one class, as a religious sect, a privilege which is denied to another, are unconstitutional and void.<sup>60</sup> So an ordinance requiring saloons to close when "any denomination of Christian people" were holding divine services anywhere in the town, which was silent as to any and all other religious worshipers, was declared discriminating and void.<sup>61</sup> How-

58. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. 1064.

59. *Per Turley, J., in Memphis v. Winfield*, 8 Humph. (Tenn.) 707, 709.

A case decided in 1844 in South Carolina sustained an ordinance of Charleston which required "free negroes and free persons of color" to take out a license for "carrying on any trade or art, or being a mechanic," etc. The discriminating feature of the ordinance was neither discussed nor

suggested. *State ex rel. Wilkinson v. Charleston*, 2 Speers (S. C.) 623.

60. *Shreveport v. Levy*, 26 La. Ann. 671.

61. *Gilham v. Wells*, 64 Ga. 192.

But ordinances forbidding the sale of liquor on Sunday, passed under ample power, are uniformly sustained. Such regulations do not affect personal or religious freedom. *Minden v. Silverstein*, 36 La. Ann. 912. See opinion of Manning, J., pp. 916, 917.

ever, it has been held in Massachusetts that a city may, by ordinance, adopt reasonable rules and regulations respecting the use of streets and public places, as by itinerant musicians, although they may belong to a certain religious organization, and such persons will not be protected after the violation of such ordinance because of the fact that the act was done as a matter of religious worship.<sup>62</sup>

**§ 748. Same—the San Francisco queue ordinance.**

An ordinance of San Francisco, although general in its terms, which was directed against the Chinese only, and imposed upon them a degrading and cruel punishment, was held to be in conflict with that clause of the Fourteenth Amendment of the Constitution which declares that, no state “shall deny to any person within its jurisdiction the equal protection of the law.” The ordinance provided that each jail prisoner should have the hair of his head “cut or clipped to an uniform length of one inch from the scalp thereof.” The regulation was intended only for the Chinese of San Francisco. It was known as the “queue” ordinance, being so designated from its purpose to reach the queues of the Chinese, and was not enforced against any other persons.

In delivering the opinion of the court, Mr. Justice Field said: “The reason advanced for its adoption, and now urged for its continuance, is that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state and county will be saved the expense of keeping him during imprisonment. Probably the basti-

62. *Commonwealth v. Plaisted*,  
148 Mass. 375, 19 N. E. 224, 12  
Am. St. Rep. 566, 2 L. R. A. 142.

nado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.”<sup>63</sup>

§ 749. Regulating personal association, employment, discriminating as to sex, etc.

An ordinance making it an offense for any person to knowingly associate with those who have the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, gamblers, etc., has been held unconstitutional, as being an invasion of the rights of personal liberty, because the law takes no notice of, and has no concern with, mere guilty intention, unconnected with any overt act or outward manifestation.<sup>64</sup>

So an ordinance making it a misdemeanor for any person to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of a city, except her husband, father, brother or other male relative, has been held to be an unconstitutional interference with personal freedom, since any person should be allowed to converse with her long enough to transact any necessary and legitimate business. It is also held that there is no reason for exempting any other male relative than the husband, father, or brother, or for failing to

63. *Ho Ah Kow v. Nunan*, 5 Sawyer (U. S.) 552, 559, 560, 12 Fed. Cas. No. 6546. See notes of Judge Cooley, at pp. 558, 559, 564-566, of the opinion. Also note to case by Judge Cooley, in 18 Am. Law Reg. 684.

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64. *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606; *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *St. Louis v. Fitz*, 53 Mo. 582. Compare *St. Louis v. Lee*, 8 Mo. App. 599.

give her mother or sister the same privilege allowed to the father or brother.<sup>65</sup>

So an ordinance forbidding any women from going into any building where liquor is sold, or to stand within fifty feet of such building, has been held void as an unnecessary interference with individual liberty.<sup>66</sup> So an ordinance which interferes with lawful employment and discriminates between the sexes, as one forbidding employment of females in dance cellars, barrooms, or in any place where malt, vinous or spirituous liquors are sold, is unconstitutional.<sup>67</sup>

In California an ordinance forbidding the sale of liquor or wines in dance halls, cellars, or other places where musical and theatrical entertainments are given and where females attend as waitresses was adjudged to be within the general grant of police power, and not violative of the state Constitution providing that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession.<sup>68</sup>

The Supreme Court of the United States sanctions the validity and constitutionality of reasonable distinctions between men and women in police regulations, and this is unquestionably the trend of the recent decisions. Such legislation is directed against disorder and immorality. Treating women as a class is within the competency of the legislative body, where such classification is reasonable. The view of this court is that a municipal ordinance which makes it unlawful for liquor sellers to provide places where women may be supplied with

65. *Heichinger v. Maysville*, 22 Ky. L. Rep. 486, 49 L. R. A. 114, 57 S. W. 619; *Cady v. Barnesville*, 4 Weekly Cin. Law Bul. (Ohio) 101, holds that ordinance making it unlawful "for any male person to walk or ride in company with any lewd female or common prostitute, or to stand and con-

verse with her upon any street," etc., unconstitutional and void.

66. *Gastenaus v. Com.*, 108 Ky. 473, 56 S. W. 705, 49 L. R. A. 111.

67. *In re Mary Maguire*, 57 Cal. 604.

68. *Ex parte Hayes*, 98 Cal. 555, 20 L. R. A. 701.

liquor, or to permit women to remain for that purpose where liquor is sold, or in any place adjacent thereto or connected therewith, or to employ women to wait upon and attend any person in such places, is a valid exercise of the police power, not repugnant to the Federal Constitution.<sup>69</sup>

### § 750. Personal liberty—drunkenness.

Ordinances which prohibit drunkenness on the streets and in other public places of the city, or which are directed against public drunkenness, are constitutional for the reason that no one has the constitutional right to appear in a state of intoxication in the streets and public places, and thereby degrade the public morals, to the annoyance and inconvenience of citizens in the discharge of their daily duties, and to destroy the peace, comfort and good order and well being of society.<sup>70</sup>

69. *Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. 219.

70. *Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750; *Lebanon v. Gordon*, 99 Mo. App. 277, 13 S. W. 222; *Green City v. Holsinger*, 76 Mo. App. 567; *De Witt v. Lacotts*, 76 Ark. 250, 88 S. W. 877.

**Drunkenness.** Compare *St. Joseph v. Harris*, 59 Mo. App. 122, where it is said: "The common council in undertaking to regulate the subject of drunkenness under its police power by its ordinance in that direction went to the uttermost limit. It would seem that in this state drunkenness is not *per se* the subject of legislative prohibition. Drunkenness cannot be made the subject of municipal regulation, except where its existence in the indi-

vidual is at a place or under circumstances or conditions when it annoys or disturbs others. And so it would appear that any sweeping regulation interdicting, under penalty, drunkenness generally, or in cases other than those specified in the exception just stated, would be an invasion of the 'inalienable rights of the citizen' (*St. Louis v. Fitz*, 53 Mo. 582)." Here drunkenness was forbidden "on any street, avenue, alley or public place within the city or any private house to the annoyance of any citizen or person." *St. Joseph v. Harris*, 59 Mo. App. 122, in substance overruled by *Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750.

See chapter 25 *post*, subdivision 4.

### § 751. Mode of trial.

Article 5 of the amendments of the United States Constitution, which provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a grand jury," is alone applicable to the exercise of the power of the Federal government, and is not a restriction upon the legislative authority of the states.<sup>71</sup> Hence it does not forbid municipal corporations from punishing such offense as they may be authorized to do by their charters and the laws of the state.<sup>72</sup>

### § 752. Officer has no vested right in office—office may be changed or abolished.

As fully discussed elsewhere officers have no vested right or private property in their offices; therefore they may be changed or abolished legally, the salary reduced or additional duties imposed without allowing additional compensation. The office is a public service and does not exist by virtue of contract. Ordinances making such changes will not be declared unconstitutional as "impairing the obligation of contracts," or as depriving the officer involved of property "without due process of law."<sup>73</sup>

## 2. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

### § 753. Ordinances cannot impair the obligation of contracts.

"No state shall pass any law impairing the obligation of contracts."<sup>74</sup> "There is no more important provision in the Federal Constitution than the one which prohibits

71. *Barron v. Baltimore*, 7 Pet. (32 U. S.) 243, 8 L. Ed. 672, per Marshall, C. J., relating to the taking of private property without just compensation. But the 14th Amendment, in this respect, is a

limitation on the power of the state.

72. *State v. Wells*, 46 Iowa 662.

73. § 494 *ante*.

74. U. S. Const., art. I, § 10.

states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded or frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them as made, are foundations of all well ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed.”<sup>75</sup>

A municipal corporation is bound by all contracts which it may legally enter into in like manner as a private corporation or an individual.<sup>76</sup> The rule as to immunity of the government from liability on contracts has no application to municipal corporations. They are held liable even when acting as representatives of the government. The rule of liability has been applied to govern the contracts and control the acts of states clothed with all the powers and prerogatives of sovereignty.<sup>77</sup>

An ordinance extending fire limits and forbidding the erection of wooden buildings within a designated district will not be held as impairing the obligation of a contract made prior to the passage of such ordinance for

75. *Murray v. Charleston*, 96 U. S. 432, 448, 449, 24 L. Ed. 760, per Mr. Justice Strong.

76. *Murray v. Kansas City*, 47 Mo. App. 105; *Steffin v. St. Louis*, 135 Mo. 44, 36 S. W. 31; *Chambers v. St. Joseph*, 33 Mo. App. 536; *Springfield Railroad Co. v. Springfield*, 85 Mo. 674, 676; *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678; 3 Cook on Corp. (4th Ed.), § 913, p. 2231; *Potter on Corp.*, § 376.

Impairing obligations. One may be employed to perform services under contract with the city without becoming a municipal officer and when such is the case the city cannot vary the terms of the

contract nor repudiate it. *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302.

City cannot repudiate by resolution or ordinance a deed which it was authorized to execute. *Dausch v. Crane*, 109 Mo. 323, 330, 19 S. W. 61.

An *ultra vires* contract is not protected by the contract clause of the Federal Constitution. *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424.

77. *Dartmouth College Trustees v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; *Western Saving Fund Society v. Philadelphia*, 31 Pa. St. 175.

the erection of a wooden structure within the prohibited district.<sup>78</sup> The constitutional provision does not apply to municipal contracts affecting the safety and welfare of the public.<sup>79</sup>

### § 754. Ordinance as "law."

The obligation of a contract can only be impaired by a "law" passed after the making of the contract.<sup>80</sup> The word "law," as used in the Federal Constitution, may be a provision of the state Constitution, a legislative act, a provision of a charter of a public or municipal corporation, or a municipal by-law or ordinance, having the force and effect of a law of the state.<sup>81</sup> "Any enactment, from whatever source originating, to which a

78. *Knoxville v. Bird*, 12 Lea (Tenn.) 121, 123, 47 Am. Rep. 326.

79. *Indiana*. *Grand Trunk, etc. R. Co. v. South Bend* (Ind., 1909), 89 N. E. 885; *Cincinnati, etc. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503.

*Kansas*. *Leavenworth v. Phillips*, 67 Kan. 549, 73 Pac. 97, 100 Am. St. Rep. 475.

*United States*. *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; *Jackson, etc. Co. v. Interstate, etc. Co.*, 24 Fed. 306.

80. "The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of such

cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statute defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed. 1059.

81. *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

**Law.** Ordinance imposing a tax is a law. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760.

Resolution of council may be such law. *Iron M. R. Co. v. Memphis*, 96 Fed. 113.



state gives the force of law, is a statute of the state within the meaning of the clause cited.”

It was therefore held that a statute of the so-called Confederate States, if enforced by one of the states as its law, was within the prohibition of the Constitution.<sup>82</sup> “So a by-law or ordinance of a municipal corporation may be such an exercise of the legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of the article of the Constitution.”<sup>83</sup> Thus the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power.<sup>84</sup> Accordingly, where a city, having power conferred by legislative grant, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, the Supreme Court of the United States held such ordinances to be laws impairing the obligation of contracts, “for the reason that the city charter gave limited legislative power to the city council, and when the ordinances were passed, under the supposed authority of the legislative act, their provisions become the law of the state.”<sup>85</sup>

But where an ordinance only grants permission to a company to lay water pipes, this merely constitutes a license and involves no exercise of legislative power,

82. *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716, per Mr. Justice Field.

83. *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607, per Mr. Justice Gray.

84. *United States v. New Orleans*, 98 U. S. 381, 392, 25 L.

Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

85. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607, per Mr. Justice Gray, citing *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760, and *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825.

though the grant is put in the form of an ordinance. Such ordinance does not constitute a by-law of the city, and still less a law of the state. The license in the form of an ordinance was granted by virtue of legislative power, which power defined the class of persons to whom, and the objects for which the permission might be granted. "All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of lands and highways of the city. The rule was established by the legislature, but administrative, and might equally well have been vested by law in the mayor alone, or in any officer of the city.<sup>86</sup> \* \* \* If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the Constitution or laws of the United States."<sup>87</sup>

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."<sup>88</sup>

86. *New Orleans, etc. Co. v. El-lerman*, 105 U. S. 166, 172, 26 L. Ed. 1015; *Day v. Green*, 4 Cush. (Mass.) 433, 438.

87. *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 32, 8 Sup. Ct. 741, 31 L. Ed. 607, per Mr. Justice Gray.

88. *Hamilton Gas Light Co. v. Hamilton*, 146 U. S. 258, 266, 13

Sup. Ct. 90, 36 L. Ed. 963, per Mr. Justice Harlan.

**Law.** When ordinance authorizing a contract does not give the contract the force of law, see *State ex rel. v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

Ordinance held to be a "law" as term used in policy of insurance. *Jones v. Firemen's Fund Ins. Co.*, 2 Daly (N. Y.) 307.

§ 755. Ordinances as contracts.

The term "contracts," as used in both the Federal and State Constitutions, comprehends all forms of legal obligations, however executed, whether between individuals, copartnerships and corporations, or between the state or a municipal corporation or governmental body or legal entity, possessing power to contract, and individuals, copartners or corporations.<sup>89</sup> "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence."<sup>90</sup>

§ 756. The "obligation" of the contract.

Obligations are of two kinds, "perfect" and "imperfect" or "civil" and "natural." The imperfect or natural is only binding in morals; it cannot be enforced by legal action. The perfect or civil may be enforced in law. Constitutions protect from impairment the latter only,<sup>91</sup> which consists in the remedy or the means to

89. *Woodruff v. Trapnall*, 10 How. (U. S.) 190, 13 L. Ed. 383; *U. S. v. Jefferson County*, 5 Dill. (U. S. Cir Ct.) 310; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

"The legislature cannot enact a law impairing the obligation of a contract by a municipal corporation." *William's Appeal*, 72 Pa. St. 214, 217.

The corporation is not liable for the non-enforcement of an ordinance on the theory that it is a contract. *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443.

Ordinances as contracts. *Warsop v. Hastings*, 22 Minn. 437;

*Bassett v. El Paso*, 88 Tex. 163, 30 S. W. 893.

When license is contract, see § 712 *ante*.

90. *Louisiana v. New Orleans*, 109 U. S. 285, 288, 27 L. Ed. 936, 3 Sup. Ct. 211, speaking of statutory right to recover of a municipal corporation damages for destruction of property by a mob, which, in effect, was taken away by the adoption of a new state constitution, after judgment had been obtained, which limited the city's power of taxation.

91. *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Dartmouth College v. Woodward*, 4

compel its performance and to make compensation in event of failure.<sup>92</sup>

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The idea of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.'"<sup>93</sup>

"The obligation of a contract," says Mr. Justice Field, "in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat* (he who gives quickly gives twice) has its counterpart in a maxim equally sound, *qui serius solvit, minus solvit* (he who pays too late pays less). Any authorization of the postponement of payment or of means by which such postponement may be effected, is in conflict with the constitutional prohibition."<sup>94</sup>

Wheat. (U. S.) 518, 529, 4 L. Ed. 629; Blair v. Williamson, 4 Litt. (14 Ky.) 34; Wood v. Wood, 14 Rich. (S. C.) 148, 154; Webster v. Rose, 6 Heisk. (53 Tenn.) 93, 19 Am. Rep. 583.

92. Louisiana v. Police Jury, etc., 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; Walker v. Whitehead, 16 Wall. (83 U. S.) 314; United States v. Conway, Hemp. 313, 25 Fed. Cas. No. 14,849; Johnson v.

Higgins, 3 Metc. (60 Ky.) 566; Sabatier v. Creditors, 6 Mart. N. S. (La.) 585; Jacobs v. Smallwood, 63 N. C. 112; Cochran v. Darcy, 5 S. C. 125; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

93. Edwards v. Kearzey, 96 U. S. 595, 598, 24 L. Ed. 793, per Mr. Justice Swayne, citing 1 Bac. Abr., tit. Actions in General, letter B.

94. Louisiana v. New Orleans, 102 U. S., at pp. 206, 207, per Mr. Justice Field.

§ 757. Question is for decision of United States Supreme Court.

While the general rule is, that the United States Supreme Court will adopt the opinion as conclusive of the highest state court on matters relating to the construction of the State Constitution and state laws, wherein no question under the laws or Constitution of the United States is involved,<sup>95</sup> the specific rule applicable to the point under consideration is: The Supreme Court will, in a proper case, decide for itself, independent of the decisions of the state courts, whether there is a contract and whether its obligations are impaired.<sup>96</sup>

The general statement of the doctrine has been formulated by Mr. Justice Bradley: "In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."<sup>97</sup>

Subsequently the court affirmed the rule, thus: "The question of the existence or nonexistence of a contract

95. *Erie R. R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 497, 29 L. Ed. 595.

96. *Shelby County v. Union and Planters' Bank*, 161 U. S. 149, 151, 16 Sup. Ct. 558, 40 L. Ed. 650; per Mr. Justice Peckham, *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341.

97. *McGahey v. Virginia*, 135 U. S. 662, 667, 10 Sup. Ct. 972, 34 L. Ed. 304.

Similar emphatic language has been used by the United States Supreme Court in subsequent cases: "In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment." *Citizens' Sav. Bk. v. Owensboro*, 173 U. S. 636, 647, 648, 19 Sup. Ct. 530, 43 L. Ed. 840.

in cases like the present (state law subjecting property of railroad corporation to taxation) is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.”<sup>98</sup>

### § 758. Taxation by municipal corporation of its own bonds, etc.

The right of a municipal corporation to tax its own bonds and other obligations held by nonresidents, by withholding the amount of the tax from the interest due

98. *Mobile & Ohio Railroad Co. v. Tennessee*, 153 U. S. 486, 492, 493, 14 Sup. Ct. 968, 38 L. Ed. 793, per Mr. Justice Jackson.

“Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.” *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 88, 12 Sup. Ct. 142, 35 L. Ed. 943.

“Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a *contract* which cannot be legally impaired.” *Gulf & Ship Island R. R. Co. v. Hewes*, 183 U. S. 66, 75, 22 Sup. Ct. 26, 46 L. Ed. 86.

The rule is discussed in the following cases: *Board of Liquidation v. Louisiana*, 179 U. S. 622, 636, 21 Sup. Ct. 263, 45 L. Ed. 347; *Stone v. Bank of Commerce*, 174

U. S. 412, 19 Sup. Ct. 747, 43 L. Ed. 1028; *Citizens’ Savings Bank v. Owensboro*, 173 U. S. 636, 647, *et seq.*, 19 Sup. Ct. 530, 53 L. Ed. 840; *Shelby County v. Union, etc. Bank*, 161 U. S. 149, 151, 16 Sup. Ct. 558, 40 L. Ed. 650; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 144, 16 Sup. Ct. 456, 40 L. Ed. 645; *L. & N. R. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; *Erie R. R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 497, 22 L. Ed. 595; *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31, 38, 8 Sup. Ct. 741, 31 L. Ed. 607; *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 265, 13 Sup. Ct. 90, 36 L. Ed. 963; *Wilmington & Weldon R. Co. v. Alsbrough*, 146 U. S. 279, 293, 13 Sup. Ct. 72, 36 L. Ed. 972; *Huntington v. Attrill*, 146 U. S. 657, 684, 13 Sup. Ct. 224, 36 L. Ed. 1123.

thereon, has been denied, because in violation of the constitutional provision under consideration. No municipality of a state can by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors. Thus where a city has issued certificates of stock, whereby it promised to pay to the owners thereof certain sums of money which had been borrowed, with six per cent interest, payable quarterly, it cannot subsequently impose a tax of two per cent on the value of all property within its limits and treat its stock as a part of such property, and direct that the tax upon it shall be retained by the treasurer of the city from the interest due thereon. The city sought to justify the tax upon the ground that it was not higher than the tax on all other property of its citizens, and that all property within the city was subject to taxation; but the court answered that, by the legislation of the city, its obligation to its creditors was impaired, and, however great its power of taxation, it must be exercised (being a political agency of the state) in subordination to the inhibition of the Federal Constitution against legislation impairing the obligation of contracts. Until the interest was paid, no act of state or political subdivision, exercising legislative power by its authority, could work an exoneration from what was promised to the creditor.<sup>99</sup>

The rule has been most frequently applied in taxation of state securities by state statutes. However, the principle is applied with like force when taxation by the

99. *Murray v. Charleston*, 96 U. S. 432, 448, 24 L. Ed. 760, per Mr. Justice Strong, approving *Cleveland, etc. R. Co. v. Pennsylvania (State Tax on Foreign-held Bonds)*, 15 Wall. (82 U. S.) 300, 21 L. Ed. 179 (Mr. Justice Miller and Mr. Justice Hunt dissented.) *Jenkins v. Charleston*, 96 U. S. 449, 24 L. Ed. 764.

Taxing mortgages of lands to

the mortgagees in the county where land lies, does not, as applied to nonresident held mortgages contravene the 14th Amendment of the United States Constitution. *Savings and Loan Society v. Multnomah County*, 169 U. S. 421, 426, 18 Sup. Ct. 392, 42 L. Ed. 803, per Mr. Justice Gray, reviewing many cases.

municipality of its own bonds or other obligations is attempted by ordinance. The rule of the United States Supreme Court "is settled that any tax levied upon them (bonds) cannot be withheld from the interest payable thereon. Such was the decision of this court in *Murray v. Charleston*."<sup>1</sup>

This doctrine was applied to a judgment for coupons of consolidated bonds issued by the City of New Orleans. Under the municipal charter the bonds were in terms exempted from taxation, and it was held that a judgment rendered thereon in favor of nonresident holders was equally exempt. The opinion also declares that in the absence of any contract in the bonds, conferring the right to impose the tax, such tax could not be levied upon bonds or other obligations of a city which belong to non-residents, without impairing the force of the obligation itself.<sup>2</sup>

### § 759. Ordinances granting franchises as contracts.

Respecting railroad charters and franchises, Mr. Justice Miller states that, in far the largest number of cases brought to the United States Supreme Court under that clause of the Constitution, "the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts—contracts found in statute laws of the state if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or

1. *Hartman v. Greenhow*, 102 U. S. 672, 683, 26 L. Ed. 271, per Mr. Justice Field.

2. *De Vignier v. New Orleans*, 16 Fed. 11, 12; *Folsom Bros. v. New Orleans*, 16 Fed. 11.

A city may tax its outstanding bonds without impairing the obligation of the contract of sale. *Bank of Russellville v. Russellville* (Ky., 1909), 118 S. W. 921.



corporations, become contracts between them and the state within the protection of the clause referred to of the Federal Constitution." He further observed that, "this has always been a very nice point" (in determining the question); "and when the supposed contract exists only in the form of a general statute, doubts still recur after all our decisions on that class of questions."<sup>3</sup>

The rules applicable to legislative franchises which constitute contracts are alike applicable to ordinances granting franchises which are "laws," and which, upon acceptance by the grantee, constitute contracts. No subsequent ordinance which constitutes a law can impair their obligations.<sup>4</sup> Thus where a city enters into a valid

**3. Franchises as contracts.** "Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created.

"The writer of this opinion has always believed, and now believes, that one legislature of a state has no power to bargain away the rights of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made." *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352.

It was held in an opinion delivered by Chief Justice Marshall that the constitutional provision extends to legislative grants which constitute a contract to which the state is a party, and

while it was admitted that one legislature is competent to repeal any act which a former legislature had legally passed yet where an act is done under a law it is not competent for a subsequent legislature to undo it. *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 135, 3 L. Ed. 162.

**4. Illinois.** *People v. Chicago*, etc. Ry. Co., 118, Ill. 113, 7 N. E. 116.

**Indiana.** *Rushville v. Rushville Nat. Gas. Co.*, 164 Ind. 162, 73 N. E. 87.

**Michigan.** *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383.

**Missouri.** *Kansas City v. Corrigan*, 86 Mo. 67.

**North Dakota.** *Northwestern Tel. Exchange Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 65 L. R. A. 771, 102 Am. St. Rep. 580.

**United States.** *Tampa Water W. Co. v. Tampa*, 199 U. S. 241, 26 S. Ct. 23, 50 L. Ed. 170; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267; *Mercantile Trust & Dep. Co. v. Columbus W. Co.*,

contract by ordinance which allots to a private corporation particular subway spaces in its streets for laying its telephone and telegraph wires, it cannot invalidate or impair that contract by a subsequent ordinance by repudiating it and allotting the same space to another company.<sup>5</sup>

The Supreme Court of the United States has held that the grant of right to supply water or gas to a city and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service of the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the Constitution of the United States against legislation to impair it.<sup>6</sup> This question fre-

130 Fed. 180; *Cleveland El. Ry. Co. v. Cleveland*, 135 Fed. 368.

Police power cannot be limited or contracted away by a state or municipality. *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341; *Snouffer v. Cedar Rapids, etc. Ry. Co.*, 118 Iowa 287, 92 N. W. 79.

Hence, a proper exercise by a municipality of its police power does not impair the obligation of a municipal grant. *Dobbins v. Los Angeles*, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341.

5. *State ex rel. v. St. Louis*, 145 Mo. 551, 46 S. W. 981.

Acting in proprietary capacity. The city in granting to a company the right to lay its wires and construct its underground conduits acts in its proprietary capacity, and in pursuance of the pow-

ers conferred upon it by charter. A contract to put electric wires underground was held to be for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the state at large, and that with reference to such contract the city must be regarded as a private corporation. *Safety Insulated W. & C. Co. v. Baltimore*, 25 U. S. App. 166, 13 C. C. A. 375, 66 Fed. 140.

Power to contract for water-works is private. *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271.

6. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77.

When contract impaired. An ordinance granting right to erect and operate electric light works is impaired if city operates works and supplies private consumers. Injunction granted. *Southwest*

quently arises in grants of franchises to lay down tracks and operate cars in streets and public ways. Whether this privilege is granted directly by the legislature, or through a municipal corporation, the acceptance thereof and the construction of tracks thereunder constitute a contract which cannot be impaired by any act of the state or city.<sup>7</sup>

### § 760. Same—imposing additional burdens.

It may be stated, as a general proposition, that when a city makes a contract for a municipal improvement, e. g., conferring the right to introduce, distribute and sell water within the city, it cannot, in derogation of its contract, by ordinance or otherwise, impose additional burdens upon the grantee or vary the conditions contained in the contract.<sup>8</sup>

So, when, by ordinance, a municipal corporation has authorized a telephone company to erect poles and string its wires, upon certain conditions, which are complied

Mo. Light Co. v. Joplin, 101 Fed. 23.

Where city has power to supply water or contract with a company for a supply, a contract with such company is impaired if city supplies water itself or contracts with another company for a supply. Injunction will lie. *White v. Meadville*, 177 Pa. St. 643, 34 L. R. A. 567, 35 Atl. 695; *Metzger v. Beaver Falls*, 178 Pa. St. 1, 35 Atl. 1134; *Welsh v. Beaver Falls*, 186 Pa. St. 578, 40 Atl. 734.

Where the grant is not exclusive, injunction will not lie to restrain the city from constructing its own plant for supplying water and light for municipal purposes, where it does not appear that the operation of such plants will necessarily interfere with the con-

tract rights of the company. *Little Falls Electric & W. Co. v. Little Falls*, 102 Fed. 663.

7. *Belleville v. Citizens' Horse Ry.*, 152 Ill. 171, 3 N. E. 584; *Port of Mobile v. Louisville & Nashville R. R. Co.*, 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; *East Louisiana R. R. v. New Orleans*, 46 La. Ann. 526, 15 So. 157; *Detroit v. Detroit City Ry.*, 56 Fed. 867, 54 Fed. 1, 64 Fed. 628; *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. 324, 3 Cook on Corp. (4th Ed.), § 913, p. 2231.

See ch. 21 *post*.

8. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886, affirming 88 Fed. 720; *Los Angeles v. Los Angeles Water Co.*, 61 Cal. 65.

with, the municipality cannot, by a subsequent ordinance, require the company to pay so much for each pole erected by it within a certain district in return for being allowed to keep and use such poles.<sup>9</sup>

So, where by ordinance, a street railroad company is granted the right to lay its tracks on the streets under conditions specified, a subsequent act imposing an additional condition, without the company's consent, in requiring the company to pave six feet on either side of its tracks, constitutes an impairment of the obligation of the franchise contract.<sup>10</sup>

So an ordinance requiring a street railway company to build an additional line and depriving it of the right under its franchise to collect a second fare from passengers transferring to other lines is unconstitutional.<sup>11</sup> But an ordinance prescribing a penalty for failure of street car companies to exhibit license certificates on its cars cannot be read into the street railway franchise, and may be amended without impairing the contract rights under the franchise.<sup>12</sup>

### § 761. Same—exclusive privileges.

A statute authorizing a municipality to contract for the erection of a bridge across a river and giving to the company exclusive privileges, that is, that no other bridge should be built across the river within a specified time or within a certain distance from the one erected,

9. *New Orleans v. Great Southern Tel. Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502, 26 Cent. Law Journal 233, and notes.

10. *Coast Line R. R. Co. v. Savannah*, 30 Fed. 646.

Such contract cannot be amended by subsequent decisions of the state court. *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594.

Grant to lay double track cannot be limited to single track.

*Burlington v. Burlington Street Ry. Co.*, 49 Iowa 144, 31 Am. Rep. 145.

Reducing rates of fare. *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385.

11. *People v. Detroit United Ry. Co.*, 156 Mich. 659, 121 N. W. 321, 16 Det. Leg. N. 223.

12. *New York v. New York City Ry.*, 117 N. Y. S. 921.

is a contract the obligations of which are fully protected against impairment by subsequent state enactments.<sup>13</sup>

An exclusive franchise granted to supply water to the inhabitants of a municipality by means of pipes and mains laid through the public streets is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of a pipe or pipes so laid.<sup>14</sup>

In one case where the city had granted the exclusive privilege to a gas company to furnish gas and subsequently granted a similar privilege to another company, the city upon complaint of the first company was restrained from proceeding to complete such grant.<sup>15</sup> It has been held that a franchise contract, consisting of an exclusive privilege to furnish gas is not violated by

13. *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall. (U. S.) 51, 18 L. Ed. 137; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. (U. S.) 116, 17 L. Ed. 571.

14. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 694, 6 Sup. Ct. 265, 29 L. Ed. 510; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170.

15. *Newport v. Newport Light Co.*, 84 Ky. 166, declining to follow *State v. Cincinnati Gas Co.*, 18 Ohio St. 262, 266; and *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, saying "the rule of law recognized in those cases and the reasoning upon which they are based or in the

cases following them, has not been sustained or approved in the recent decisions of the Supreme Court (U. S.) in cases involving like questions," citing *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 665, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; *New Orleans Water Works v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525.

Injunction to protect exclusive privilege to lay gas pipes in streets and to furnish gas, granted. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

Injunction denied. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505.

granting the right to another company to furnish electricity.<sup>16</sup>

### § 762. Franchise contracts authorized by state.

The state may enter into contracts with the city in matters outside of its charter, which cannot be impaired or annulled, notwithstanding the unlimited and autocratic power of the legislature over cities.<sup>17</sup> Thus where a municipal corporation, by authority of the state, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the state.<sup>18</sup> Such a contract is *pro haec vice* the contract of the state and cannot be impaired by it. Hence where the common council of a city in the exercise of power conferred by the legislature, made an absolute grant to a horse railway company of the right to build its road on certain streets, and the company accepted the grant and built a part of the road at great expense, it was held that the legislature could not, by a subsequent amendment of the charter, make the right of the company to build the rest

16. *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 529.

When exclusive privilege to furnish gas does not exist. *Vincennes v. Citizens' Gas Light & Coke Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. (Tenn.) 314; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

See Ch. 21 *post*.

17. Black on Const. Prohibition, § 49.

18. *Sunset Telephone & Teleg. Co. v. Pomona*, 172 Fed. 829; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27 Sup. Ct. 762; *Rochester v. Rochester Ry. Co.*, 91 N. Y. S. 87, 98 App. Div. 521.

A valid contract made by a municipal corporation cannot be impaired by the legislature. *Shinn v. Cunningham*, 120 Iowa 383, 84 N. W. 941; *Kapp v. Washtenaw County Auditors*, 137 Mich. 431, 100 N. W. 603; *Ludlow v. Peck-Williamson H. & V. Co.*, 25 Ky. L. Rep. 831, 76 S. W. 377; *Wiggin v. Manchester*, 72 N. H. 576, 58 Atl. 522; *Feemont E. & M. V. Ry. Co. v. Pennington*, 20 S. D. 270, 105 N. W. 929.

A franchise extended by ordinance after a new state constitution has been adopted is subject to the provisions of the new constitution. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491.

of the road dependent on the consent of a majority of the property owners on the street.<sup>19</sup>

§ 763. Reservation of right to alter, amend or repeal franchise contracts.

When privileges, franchises, etc., of the character under consideration are granted, either by the state or municipal corporation, the practice generally prevails to reserve the power to alter, amend or repeal whenever the public interest may require, and this question is solely within the discretion of the legislative authorities. Such reservation may be in the State Constitution, legislative act, municipal charter or in the law or ordinance granting the franchise.<sup>20</sup> Where the power to regulate the franchise and impose conditions is reserved no question as to the impairment of the obligation of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise.<sup>21</sup> The reserved power authorizes the making of any alteration or amendment which will not defeat or substantially impair the object of the grant or any rights

19. *Hovelman v. Kansas City Horse Ry. Co.*, 79 Mo. 632.

20. *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Henderson v. Central, etc. Ry.*, 21 Fed. 358, 3 Cook on Corp. (4th Ed.), § 913, p. 2236.

Rule applied in case of tax exemption. *New York, etc. R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55; *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. Ed. 303; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357;

*Maine, etc. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836.

A general reservation in the state law of power to alter, revoke or repeal a corporate franchise becomes a part of such franchise and need not be expressly stated therein. *State v. St. Mary's etc. Petroleum Co.*, 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558; *In re College Hill, etc. Assn.* (Cal., 1910), 108 Pac. 681.

And charter rights held subject to such reservation are not protected by the contract clause of the constitution. *Missouri Pac. Ry. Co. v. State*, 216 U. S. 262, 30 Sup. Ct. 330.

21. *Sioux City Street Ry. Co. v. Sioux City*, 133 U. S. 93.

vested under it. "The power of alteration and amendment is not without limitation, but must be in good faith and consistent with the specific object of the charter."<sup>22</sup>

The reserved power to alter or amend will be construed favorably to the public. Thus, under a statute conferring power to regulate water rates which are required to be "fixed by ordinance," the power was construed as continuing and authorized charges in rates from time to time as might be deemed necessary and just, both to the company and public.<sup>23</sup>

### § 764. Contracts of contractors for public work.

Charters and ordinances generally provide for public improvements, as streets, sewers, etc., to be paid for by special taxation or assessment at the expense of the property owners. Ordinarily, the city in such case, does not assume any liability, but when the work is completed in accordance with the ordinance and contract providing therefor special tax bills are issued to, and in the name of, the contractor which become liens on the property abutting upon the improvement, or, the property in the improvement, benefit, or special taxing, district. Sometimes after the contract is let and the work begun the laws or charter or ordinances governing such matters are changed, and hence it is then important to determine when such changes constitute an impairment of the obligation of the contract, within the meaning of the Federal Constitution. Therefore, it is deemed proper to consider this subject as especially applicable to municipal ordinances.

The contract takes its character and receives its obligation from the law in force at the time it is made and

22. Per Jackson, J., in *Hill v. Glasgow R. R.*, 41 Fed. 610; *San Joaquin & K. R. Co. v. Stanislaus County*, 113 Fed. 930.

See ch. 21 *post*.

23. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, affirming 178 Ill. 571, 53 N. E. 363.



the rights acquired under it cannot be affected materially by a subsequent repeal or change of the law.<sup>24</sup> In other words, the laws which subsist at the time and place of making a contract enter into and form a part of it, as much so as if such laws were expressly referred to and incorporated in its terms. "This rule embraces alike those which affect its validity, construction, discharge and enforcement."<sup>25</sup> Thus a legislative act authorizing the levy of the requisite tax to pay municipal bonds and in force when the bonds are issued enter into and become a part of the contract under which the bonds are delivered and taken.<sup>26</sup>

As stated by the United States Supreme Court, "no attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which under the form of modifying the remedy impair substantial rights. Every case must be

24. *Georgia*. Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56.

*Iowa*. Starr v. Burlington, 45 Iowa 87.

*Louisiana*. State v. Bermudez, 12 La. 352; Daquin v. Coiron, 3 La. 387, 407; Arnaud v. Executor, 3 La. 337.

*New York*. People v. Brooklyn, 23 Barb. (N. Y.) 180.

*North Carolina*. Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178.

*Ohio*. Finnell v. Howells, 2 Cin. R. (Ohio) 150; Ehni v. Columbus, 2 Ohio C. Dec. 283; Cincinnati v. Seasongood, 46 Ohio St. 296, 23 N. E. 630; Squier v. Cincinnati, 5 Ohio Cir. Ct. Rep. 400; Shehan v. Cincinnati, 11 Ohio Dec. 198, 25 Wkly. Law Bul. 212.

*Pennsylvania*. Morton v. Homestead Borough, 15 Pa. County Ct. Rep. 646; Penrose v. Erie Canal Co., 56 Pa. St. 46, 49.

*Rhode Island*. In re Dyer St., 11 R. I. 166.

*United States*. Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. Ed. 357; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 550, 18 L. Ed. 403.

25. Per Mr. Justice Swayne in Edwards v. Kearzey, 96 U. S. 595, 601, 27 L. Ed. 793, citing Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403, and McCracken v. Hayward, 2 How. (U. S.) 608; Nat. Bk. v. Sebastain Co., 5 Dillon (U. S.) 414, 17 Fed. Cas. No. 10,040; Columbia Co. v. King, 13 Fla. 451; Helm v. Pridgen, 1 White & W. Civ. Cas. Tex. Ct. App., § 644.

26. McCless v. Meekins, 117 N. C. 34, 40, 23 S. E. 99, approving Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 555, 18 L. Ed. 403.

determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and to that extent void.”<sup>27</sup>

**§ 765. Same—rights vested in the contractor.**

What rights are vested in the contractor for public work by virtue of his contract? Clearly the remedy or means of enforcing the contract constitutes substantial rights. But what do these means include? They plainly embrace the right to have the corporate authorities proceed to levy the special tax and deliver the tax bills. The vested right of the contractor is to have such tax bills aggregate in amount the contract price for the work, and further to have such tax bills operate as first liens on the respective lots benefited by reason of the improvement. The contractor must look to the property owners and their property for payment of his tax bills, for under most municipal charters, in no event, can the city be made liable for any part of the work if all the tax bills issued therefor should prove to be worthless for any reason. The change of law must neither deny nor prejudice the contractor in any of these rights. The new method must not be less secure than the old, for the contractor is not compelled to take additional hazard.<sup>28</sup>

27. *Seibert v. Lewis*, 122 U. S. 284, 294, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

A mere change of remedy will not impair the obligation provided a substantial or efficacious remedy remains, or is given by the law making the change by means of which a party can enforce his rights under the contract. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 47 L. Ed. 249, affirming 109 Wis. 208, 85 N. W. 376, 96 Am. St. Rep. 870, 23 Sup. Ct. Rep. 234; *McCullough v. Virginia*,

172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93; *McGahey v. Virginia*, 135 U. S. 685, 10 Sup. Ct. 972, 34 L. Ed. 304; *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 208.

28. In event of change the new remedy must be as efficient and substantial as that which subsisted when the contract was made; this for the reason that the remedy is necessarily inseparable from the obligation.

Merely changing the method of levying the special tax,<sup>29</sup> as by transferring such power from the city coun-

*United States.* Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

*Alabama.* Coosa River Steamboat Co. v. Barclay, 30 Ala. 120.

*California.* Cohen v. Wright, 22 Cal. 293; *Smith v. Morse*, 2 Cal. 524.

*Connecticut.* Appeal of Mechanics' and Farmers' Bank, 31 Conn. 63.

*Georgia.* Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56; *Lockett v. Usry*, 28 Ga. 345.

*Kentucky.* Griswold v. Hepburn, 63 Ky. 20.

*Louisiana.* Robert v. Coco, 25 La. Ann. 199; *Rowlett v. Shepherd*, 4 La. 86.

*Maine.* Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

*Massachusetts.* Commonwealth v. Comars, 6 Pick. (23 Mass.) 501.

*Mississippi.* Musgrove v. Vicksburg & N. R. Co., 50 Miss. 677; *Lessley v. Phipps*, 49 Miss. 790; *Commercial Bank v. Chambers*, 8 S. & M. (16 Miss.) 9.

*New Hampshire.* Rich v. Flanders, 39 N. H. 304.

*North Carolina.* Williams v. Weaver, 94 N. C. 134.

*Pennsylvania.* Rhines v. Clark, 51 Pa. St. 96; *Kenyon v. Stewart*, 44 Pa. St. 179.

*Tennessee.* Hope v. Johnson, 2 Yerg. (10 Tenn.) 123.

*Texas.* Treasurer v. Wygall, 46 Tex. 447.

"It is to be understood that the encroachment thus denounced must be material. If it is not material, it will be regarded as of no account." Per Mr. Justice Swayne in *Edwards v. Kearzey*, 96 U. S. 595, 601, 24 L. Ed. 793.

Additional remedy given to the people by *mandamus* subsequent to the granting of street railway franchises, held not to impair the obligation of a franchise contract. Per Mr. Justice Harlan in *New Orleans & L. R. Co. v. Louisiana*, 157 U. S. 219, 15 Sup. Ct. 581, 39 L. Ed. 679.

Changing the municipal charter as to method of serving process subsequent to the issue of municipal bonds, held to be valid as the matter of proceedings was not a part of the contract. *Perkins v. Watertown*, 5 Biss. (U. S.) 320, 19 Fed. Cas. No. 10,991.

The property owner's vested right to be assessed according to the method in force when the work is ordered includes only the amount and time of payment. A change of method which does him no injury in these respects may be made without impairing his rights. *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26.

29. Curative act changing the method of special assessment. In a Massachusetts case, a law which conferred power upon the street commissioner of Boston to make sewer assessment in a particular manner had been held to be unconstitutional in *Sears v. Street Commissioner*, 173 Mass. 350, 53 N.

cil to a court and jury, does not impair the means of enforcement. The contractor is held to have no vested right in the particular method existing at the time the contract is made.<sup>30</sup> But if the method of ascertaining

E. 876; and the legislature thereafter substituted therefor a section containing the following provisions: "The board of street commissioners of said city at any time within two years after any *new sewer* or drain \* \* \* is completed, shall assess upon the several estates especially benefited by such sewer or drain, a proportional part of the cost thereof, not exceeding in amount the sum of four dollars per linear foot," and goes on to provide for a re-assessment of any such assessment which shall have been found to be invalid and is unpaid or which shall have been recovered back. The act containing the original provision was approved May 22, 1897; the substituted section took effect June 1, 1899; held that a sewer built under order of August 5, 1897, begun July 23, 1897, and completed April 5, 1898, is a "new sewer" within the meaning of the provision of the substituted section above quoted and that the provision is constitutional. In this case the proceeding was a petition by a tax payer for a writ of *certiorari*, to quash proceedings for special assessments to pay for sewer construction. *Hall v. Street Commissioners of Boston*, 177 Mass. 434, 59 N. E. 68.

30. In *Palmer v. Danville*, 166 Ill. 42, 45, 46, 46 N. E. 629, the special tax levy, to pay for sewer and water connections was made prior

to the change in the law. Upon proceedings taken after the amendment, the tax levy was held invalid as inequitable. In the proceeding to re-assess the tax, the new law was applied, and the property owners were allowed to have a jury pass upon the question of benefits. Prior to the change the power to determine the amount of such benefits was vested in the city council, and its exercise was not ordinarily subject to review. "There was no saving clause in the amendatory act and the statute thereby repealed must be considered except as to proceedings passed and closed as if it never had existed." Respecting the contention that the change disturbed the vested rights of the contractors, the court said (p. 45): "So far as the contractors were concerned the tax had not been determined previous to the substitution of the amended section. The manner in which it had been attempted to fix the benefits had been set aside by this court as illegal and the first proceeding to determine such benefits in conformity with the law was after the adoption of the amendment. The right (p. 46) of the contractors that the city should proceed to levy according to law and some principle of equality the special tax to pay for the improvement was not impaired."

the special tax under the new law should result in a less sum in the aggregate than by following the old provisions, clearly the obligation of the contract would be impaired, for the contractor would be compelled to take less money than the amount stipulated in his contract.<sup>31</sup>

31. *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

In a grading contract with a city the contractor was to receive a certain portion of his pay as the work progressed on estimates to be made by the city engineer, the remainder due being payable on completion and acceptance of the work. Held, that it was not competent for the legislature to change the city charter so as to bind the contractor to a new estimate made without his consent, or to accept less money than he had really earned. "As no legislation can be valid which impairs the obligation of a contract, there can be no ground for claiming that the estimate made under the law of 1869 (law changing charter) is of any legal force concluding the contractor. It is authority for the new estimate but could not cut off the right to further payment, if it before existed." Per Campbell, J., in *State ex rel. Whitely v. Lansing*, 27 Mich. 131, 132.

Limiting the amount of recovery constitutes impairment. *Walker v. Whitehead*, 16 Wall. (U. S.) 314, 21 L. Ed. 357.

Changing time and method of payment of municipal indebtedness. *Tribune Association v. New York*, 48 Barb. (N. Y.) 240; *Hadfield v. New York*, 2 Abb. Prac. (N. S.) (N. Y.) 95; *Eidemiller v.*

*Tacoma*, 14 Wash. 376, 383, 44 Pac. 877.

State indebtedness. *Forstall v. Consolidated Association*, 34 La. Ann. 770; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Lamkin v. Sterling*, 1 Idaho 92; *Swann v. Buck*, 40 Miss. 268.

Presenting and allowing claim; charter change respecting, held not to impair obligation. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 23 Sup. Ct. 234, affirming 109 Wis. 208, 85 N. W. 376, 96 Am. St. Rep. 870.

Act postponing the payment of municipal indebtedness and stopping the interest thereon, held to be an impairment of the obligation of the contract. *Williams's Appeal*, 72 Pa. St. 214.

Law denying execution on judgments against a city, held to be unconstitutional. *New Orleans v. Morris*, 3 Woods (U. S.) 115, 18 Fed. Cas. No. 10,183.

Material change as to method of raising revenue necessary to meet the accruing interest on municipal bonds which impair the rights or remedies of the bondholders is unauthorized. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *In re Copenhaver*, 54 Fed. 660; *State ex rel. v. Young*, 29 Minn. 474, 9 N. W. 737.

**§ 766. Same subject—illustrative cases.**

In an Ohio case, a street improvement contract was duly let under a law in existence at the time the contract was made which limited the amount of the special tax to fifty per cent of the value of the property assessed, and provided that all excess should be paid by the city. Before the ordinance making the assessment to pay for the work was passed and took effect, the law was changed limiting the special tax to twenty-five per cent of the lot value, and providing, as the prior law, that all excess should be paid by the corporation. There was no saving clause in the latter act. Under the latter act the lot in question was only liable for \$165 assessment, but under the law in force at the time the contract was made the assessment of \$386.59 was valid. The corporate authorities, following the provision of the repealed law, made the assessment \$386.59. The contract provided that the city should not in any event "be liable to pay for any part of said work or of the material used for the same, except such as may properly be chargeable upon city property bounding or abutting the said street." It thus

**Imposing additional burdens or** varying the conditions of a contract to supply water to the city by ordinance or otherwise, is forbidden. *Los Angeles v. Los Angeles Water Co.*, 61 Cal. 65.

**Law imposing certain conditions precedent to payment of municipal indebtedness** which are reasonable and which did not render less effective pre-existing remedies are valid. *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132, affirming 32 La. Ann. 493; *State v. New Orleans*, 32 La. Ann. 493; *Lincoln v. Grant*, 38 Neb. 369, 56 N. W. 995; *Parker v. Buckner*, 67 Tex. 20, 2 S. W. 746.

**But unreasonable conditions** contained in state laws or ordinances respecting the presentation or registry of bonds, warrants, claims, judgments, etc., against the city are void. *McCracken v. Moody*, 33 Ark. 81; *Robinson v. Magee*, 9 Cal. 21, 70 Am. Dec. 638; *Rose v. Estudille*, 39 Cal. 270; *Priestly v. Watkins*, 62 Miss. 798; *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735; *Sands v. Edmunds*, 116 U. S. 585, 6 Sup. Ct. 515, 29 L. Ed. 739; *Willis v. Miller*, 29 Fed. 239; *McCauley v. Brooks*, 16 Cal. 11, 29-31, per Field, C. J.; *Brewer v. Otoe County*, 1 Neb. 373, 381.

appears that if the amended law governed the contractor would lose the difference between \$386.59 and \$165, or \$221.59, for he surrendered all claim on the city for any excess of cost over the assessment by his contract. The improvement ordinance, passed before the contract was made, provided that "the costs and expenses were to be ascertained and assessed according to the provisions of the acts of the legislature and other ordinances of the city on the subject of special taxes." The court sustained the assessment under the old law.<sup>32</sup>

In a Texas case the action was to recover the amount of two certificates of assessment for work done in constructing a pavement in front of defendant's property under a contract with the city, dated October 3, 1888. The work had been regularly let and was completed Octo-

**32. Old law governs, when.** "In the case before us, the law in force at the time the city obligated itself to make an assessment equal to the contract price of the work, created the obligation of this contract. The act of 1870 impaired that obligation by depriving the city of the power to perform without any provision to make good to the contractors the difference. The city was not bound to make it good out of the general fund, and could not be compelled to do so, under the authority of the cases cited from 18 Ohio St. (*Creighton v. Toledo*, 18 Ohio St. 447; *Welker v. Toledo*, 18 Ohio St. 452). Its obligation was to pay by assessment and in no other way. It could be made liable in no other way without the assent of both parties." In referring to the constitutional power of the legislature to restrict the power of municipal corporation in their powers of taxa-

tion, assessments, etc., the court remarked that such power was subject to the limitation of the Federal Constitution that, "no state shall pass any law impairing the obligation of contracts." Concluding, the court observed (p. 434): "When the legislature has invested the corporation with the power to improve streets, and raise money to pay the cost of such improvements by an assessment, and persons have, on the faith of this power and the stipulation of the corporation, performed the contract, and the contractor has become entitled to the consideration there is a (p. 435) contract obligation to pay, valid in all respects, that may be enforced. Such a contract is as free from legislative control as one between individuals. It is wisely limited by the constitutional provisions." *Goodale v. Fennell*, 27 Ohio St. 426, 434, 22 Am. Rep. 321.

ber 30, 1888. As the law required, the city engineer made out the roll, showing property fronting on the improvement, the owners, etc., the total cost of work and sum assessed against each lot owner, etc. This was not approved by the city council, as the city charter directed, but the mayor and secretary issued certificates of assessment (tax bills). Afterwards it was discovered that these certificates were defective. The city council ordered that the city engineer make out a new and corrected roll and that upon a return of the unpaid certificates they be cancelled and new certificates be issued. This was done, but before their issue the section of the charter under which the contract was let and the work done had been repealed (March 15, 1889) and a new section substituted, providing a wholly different mode of making street improvements and a different method of issuing certificates. It was claimed that the certificates were void. The court held the certificates valid. "The provisions of the last amendment of the city charter are so variant from the section as it existed at the time of the contract that certificates in accordance with the new section for work done under the old could not be issued without materially altering the terms of the contract. The legislature could not repeal the law or any of its provisions so as to impair the contract. If it had provided as effective a remedy under the new as existed under the old it might be held that the old law was repealed. But such is not the case. The certificates provided for in the new section are materially different from those provided for in the old. It is not to be presumed that the legislature intended to repeal the old section as to existing contracts." <sup>33</sup>

33. *Flewellyn v. Proetzel*, 80 Tex. 191, 197, 15 S. W. 1043.

As affecting the validity of laws providing for the payment of special tax bills in annual installments, passed subsequent to the letting of the contract for the

work, see argument of Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States in *Edwards v. Kearzey*, 96 U. S. 595, 601, 602, 24 L. Ed. 793.



## § 767. Same subject.

In one case a change of mode of assessment for street improvement was held applicable to the assessment for improvements which were in progress at the time of the passage of the amendment, notwithstanding the assessment had been made under the old law and certificates delivered to the contractors; but here the certificates were returned and the contractors agreed to a new assessment.<sup>34</sup>

In a Texas case after the contract was let, and about the time the work was completed the municipal charter was repealed and a new charter without a saving clause as to executed contracts was made, changing the method of payments. Here it was held that the abutter cannot be taxed under the new act.<sup>35</sup>

In another Texas case street improvements were caused to be made. When about completed a new charter was adopted. No assessment was levied. The city did not follow the requirement of the charter in doing the work. The provisions of the new charter were inconsistent with those of the old. Here it was held that no levy for the improvement could be made under either charter.<sup>36</sup>

In a Washington case, the municipal charter authorized the council to provide by ordinance the manner of making street assessments. An ordinance passed pursuant thereto provided that the expense should be assessed upon property in the assessment district according to its value. A subsequent charter provided that the expense of the improvement should be levied according to the frontage of the property on the improvement. Here it was held that an assessment made according to

34. *Hines v. Leavenworth*, 3 Kan. 186.

The repeal of the law does not affect proceedings. *Risley v. St. Louis*, 34 Mo. 404.

35. *Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128; See

*Dallas v. Atkins*, (Tex. Civ. App. 1895), 32 S. W. 780; *Dallas v. Dallas Consolidated Traction Ry. Co.* (Tex. Civ. App. 1895), 33 S. W. 757.

36. *Ardrey v. Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726.

value after the charter took effect was invalid, although the improvement was ordered under the first charter.<sup>37</sup>

### § 768. Interest on special tax bills as part of obligation.

Reduction in the rate of interest after the contract is let and the work begun is sometimes made and the question is then presented whether the provisions relative to interest constitute a part of the contract obligation. Respecting this proposition there is apparent conflict in the decisions. In one case the Supreme Court of the United States,<sup>38</sup> with a divided court, held that a city may reduce the rate of interest on judgments when interest is not provided for in the contract. Other cases have announced the same rule.<sup>39</sup> The doctrine of these cases is that, if not stipulated in the contract, interest is to be regarded as in the nature of a penalty or liquidated damages, arising merely by virtue of the operation of law, which may be changed at the pleasure of the state. However, these cases deal solely with interest on judgments, which matter is usually regulated by general laws. In the opinions a judgment is not viewed as a contract at all.<sup>40</sup> Therefore, the conclusion is reached that a mere

37. *Wilson v. Seattle*, 2 Wash. St. 543, 27 Pac. 474.

38. *Morley v. Lake Shore and Michigan Southern Ry.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

39. *Nevada Co. v. Hicks*, 50 Ark. 416, 8 S. W. 180; *Read v. Mississippi*, 69 Ark. 365, 63 S. W. 807.

40. "A judgment is, in no sense, a contract or agreement between parties." *Wyman v. Mitchell*, 1 Cowen (N. Y.) 316, 321.

"A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the parties. Even a judgment founded upon a contract is no contract." *McCoun v.*

*N. Y. Cent. R. R.*, 50 N. Y. 176, 180.

"A judgment is no contract nor can it be considered in the light of a contract; for *judicium redditur in invitum*." Per Lord Mansfield in *Bidleson v. Whytel*, 3 Burrow 1545.

"The term 'contract' is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for consideration proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." *Louisiana v. New Orleans*, 109 U. S. 285, 288, 3 Sup. Ct. 211, 27 L. Ed. 936.

penalty imposed for not paying a judgment when rendered is not a part of the obligation of the contract from which the judgment sprung.

Does the doctrine of these cases go further than to establish the rule that the provisions of the state statute respecting interest on judgments do not constitute a part of the contract for the improvement? These provisions may be excluded and also the general statutory provisions relating to interest on contracts in general, judgments, etc., and the question remains whether the repealed provisions of the charter or ordinances as to interest on special tax bills do not constitute a part of the contract, as much so as if written therein, or as much so as other provisions of the law—statute, charter or ordinance—which authorize the making of the contract, and which control its operation, although not set out in the contract or even referred to therein.<sup>41</sup>

In one case the charter rate of interest was treated as a part of the contract up to the date of judgment on the tax bills and then on the judgment the rate of interest prescribed by general statute was applied. The court declared that the fifteen per cent interest provided by the charter was more in the nature of a penalty than a contract. The charter did not provide that the judgment should bear fifteen per cent interest, therefore, the law in existence when the judgment was entered controlled. But the point of the case is that the contractor was given the benefit of the charter rate of interest up to the date of judgment.<sup>42</sup>

In a Pennsylvania case, a legislative act forbidding the computation of interest on prior municipal indebtedness after a specified date, was held to violate the "Constitution clearly, plainly, palpably and in such manner as to leave no doubt or hesitation in our minds."<sup>43</sup> If

41. *Buchan v. Broadwell*, 86 Mo. 31, seems to give an affirmative answer.

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42. *St. Louis v. Allen*, 53 Mo. 44.

43. *William's Appeal*, 72 Pa. St. 214.

a new provision reducing the rate of interest can be made to apply to contract for public work on the theory that charter interest is not a part of the obligation, then for like reason, a new section forbidding any interest whatever on special tax bills can be made to apply.<sup>44</sup>

### § 769. When new remedy controls.

Where a remedy is legally changed, all rights of action are enforceable under the new procedure.<sup>45</sup> It is not enough that the remedy is changed and rendered less speedy and convenient. If there is still a substantial remedy left to enable the party to enforce his rights that is sufficient.<sup>46</sup> If the new remedy is not unreasonable and will enable the party to enforce his rights without new and burdensome restrictions the party is bound to pursue the new remedy.<sup>47</sup>

### § 770. When old law to be followed.

Where the change of remedy is substantial or material the old law remains in force for the purpose of completing the execution of all contracts made by virtue of it.

44. Further as to changing rates of interest, see *Cox v. Marlatt*, 36 N. J. L. 389; *Verree v. Hughes*, 11 N. J. L. 91; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 429; *Wilson v. Marsh*, 13 N. J. Eq. 289.

45. *Winslow v. People*, 117 Ill. 152, 7 N. E. 135, affirming 17 Ill. App. 222.

46. *James v. Stull*, 9 Barb. (N. Y.) 482.

47. Per Mr. Justice Clifford, in *Edwards v. Kearzey*, 96 U. S. 595, 608, 24 L. Ed. 793.

Rule applied to proceedings to ascertain damages to lands by the construction of a canal. *Common-*

*wealth v. Beatty*, 1 Watts. (Pa.) 382.

Statute of limitations. *Gilman v. Cutts*, 23 N. H. 376.

Assessments for construction of drains, where law repealed without saving clause. *Bate v. Sheets*, 64 Ind. 209; *McKinsey v. Bowman*, 58 Ind. 88; *Board of Commissioners, etc. v. Ruckman*, 57 Ind. 96, 102; *Roush v. Morrison*, 47 Ind. 414, 416, 417.

New remedy to be followed if adequate. *Van Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *McMillan v. Sprague*, 4 How. (U. S.) 647, 35 Am. Dec. 412; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. Ed. 143.

In other words, a law, although repealed, is still in force for the purpose of giving the remedy provided by the obligation of the contract.<sup>48</sup>

In an Illinois case the improvement ordinance made the assessment payable in five installments, as provided by law then in force. Subsequently the law was changed, providing for the division of an assessment into not more than ten installments, which had been held to operate as an amendment of the previous law.<sup>49</sup> It was held that as the prior law was in force when the ordinance was passed and the proceedings instituted, they were unaffected by the change in the law.<sup>50</sup>

A contract with a municipal corporation was made and the work performed, in reliance upon the mode of taxation enabling the corporation to perform its part, which afterwards was declared to be unconstitutional by the State Supreme Court. Subsequently the state legislature supplied the place of the void law with another which gave the power to levy a tax to pay the debt. Judgment was then obtained and application made for *mandamus* to enforce its collection, when the latter law was repealed. Here the repeal was disregarded, and the same rule applied as though the latter law had existed at the date of the contract. The case seems to rest upon the proposition that "where a remedy has once been accorded, the right to employ it existed, and especially where, as in this case, its employment had actually been entered upon, there was no power in the legislature to take away that remedy without the substitution of some reasonable mode of relief in its place."<sup>51</sup>

48. Rule applied to levy and collection of taxes for payment of judgment against municipal corporation. *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

49. *English v. Danville*, 150 Ill. 92, 36 N. E. 994.

50. *Merriam v. People ex rel.*, 160 Ill. 555, 43 N. E. 705.

51. *Brooks v. Memphis* (U. S. Cir. Ct. W. D. Tenn.), 4 Federal Cas. No. 1954, 3 Cent. L. J. 356.

### 3. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

#### § 771. Ordinances cannot interfere with or regulate interstate or foreign commerce.

Under the Constitution of the United States the Congress possesses exclusive jurisdiction, "to regulate commerce with foreign nations, and among the several states."<sup>52</sup> Therefore, all state laws or municipal ordinances, which, in effect, interfere with, or constitute a regulation of such commerce, clearly violate this provision of the Federal Constitution, and will be declared void by the courts.

While most of the cases relating to this subject involved state laws, the principles are obviously the same whether the regulation is attempted by statute or municipal ordinance. The exercise of state authority, in whatever form manifested, which directly regulates interstate commerce is repugnant to the commerce clause of the Federal Constitution.<sup>53</sup>

Respecting this doctrine, the following principles, established by the United States Supreme Court, were stated by Mr. Justice Bradley: "The Constitution of the United States, having given to Congress the power

52. Constitution U. S., art. I, § 8, par. 3.

53. *Arkansas*. *St. Louis, Iron Mountain & Southern Railway Co. v. State*, 85 Ark. 284, 107 S. W. 989; *Frank A. Menne Factory v. Harback*, 85 Ark. 278, 107 S. W. 991.

*Colorado*. *Stubbs v. People*, 40 Colo. 414, 90 Pac. 1114, 11 L. R. A. (N. S.) 1071; *International Trust Co. v. Leschen & Sons Rope Co.*, 41 Colo. 299, 92 Pac. 727.

*Idaho*. *Belle City Mfg. Co. v. Frizzel*, 11 Idaho 1, 81 Pac. 58.

*Texas*. *Ex parte Massey*, 49

*Tex. Cr. App.* 60, 92 S. W. 1086; *St. Louis S. W. Ry. Co., etc. v. Cannon*, 31 *Tex. Civ. App.* 219, 71 S. W. 994.

*West Virginia*. *Jennings v. Big Sandy & C. R. Co.*, 61 W. Va. 664.

*United States*. *United States v. Northern Securities Co.*, 120 Fed. 721; *Crescent Liquor Co. v. Platt*, 148 Fed. 894; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167; *Lowe v. Seaboard Air Line Ry. Co.*, 63 S. C. 248, 41 S. E. 297, 90 *Am. St. Rep.* 678.

to regulate commerce, not only with foreign nations but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health and comfort of persons and the protection of property and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and imposes taxes upon all property within the state, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce." 5

54. *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, quoted with approval in *Caldwell v. North Carolina*, 187 U. S. 622, 625, 23 Sup. Ct. 229, 47 L. Ed. 336.

A law cannot be deemed a regulation of commerce among states merely because it may incidentally or indirectly affect it.<sup>55</sup> Thus an ordinance requiring Trinidad Lake asphalt to be used for street improvements is not a violation of the commerce clause of the Federal Constitution, though such asphalt is a product of a foreign country and other deposits from which suitable asphalt could be had, can be procured in the United States.<sup>56</sup>

### § 772. Meaning of term "commerce."

The able and comprehensive opinion of Chief Justice Marshall, delivered in *Gibbons v. Ogden*,<sup>57</sup> declares the fundamental principle for the construction of the commerce clause of the Federal Constitution. The doctrine of that opinion has been consistently followed by the United States Supreme Court in all subsequent cases, involving many state laws and municipal ordinances re-

For history and necessity of federal control of interstate and foreign commerce, see article of James Madison, 42 *Federalist*, p. 262 *et seq.*; Opinion of Chief Justice Marshall, in *Brown v. Maryland*, 12 *Wheat.* (U. S.) 419, 6 L. Ed. 678, of Mr. Justice Miller, in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

55. *Indiana*. *United States Express Co. v. State*, 164 *Ind.* 196, 73 N. E. 101.

*Kentucky*. *Louisville & Nashville R. Co. v. Central Stock Y. Co.*, 30 *Ky. L. Rep.* 18, 97 S. W. 778.

*New Jersey*. *Ames v. Kirby*, 71 N. J. L. 442, 59 *Atl.* 558.

*New York*. *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 112 *Am. St. Rep.* 628.

*North Carolina*. *Morris*, etc.

*Co. v. Southern Exp. Co.*, 146 N. C. 167, 59 S. E. 667.

*South Carolina*. *Charles v. Atlantic Coast Line R. Co.*, 78 S. C. 36, 58 S. E. 927.

*United States*. *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 *Sup. Ct.* 784, 48 L. Ed. 1142; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; 24 *Sup. Ct.* 132, 48 L. Ed. 268; *M., K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 18 *Sup. Ct.* 488, 42 L. Ed. 878; *Kelley v. Great Northern R. Co.*, 152 *Fed.* 211; *Logan & Bryan v. Postal Teleg. & Cable Co.*, 157 *Fed.* 570; *Asbell v. State*, 209 U. S. 251, 28 *Sup. Ct.* 485.

56. *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 *Sup. Ct.* 784, 48 L. Ed. 1142, 188 *Mo.* 182, 86 S. W. 860.

57. 9 *Wheat.* (U. S.) 1, 6 L. Ed. 23.



lating to the subject. In that case the great jurist declared: "In regulating commerce with foreign nations the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state then the power of Congress may be exercised."<sup>58</sup>

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens or subjects of foreign countries and between the citizens of different states."<sup>59</sup>

**§ 773. No analogy between the power of taxation and the regulation of commerce.**

In *Gibbons v. Ogden* the Chief Justice declared that the power of taxation is indispensable to the existence of the states, "and is a power which, in its own nature is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, suscep-

58. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 195, 6 L. Ed. 678.

59. *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347, quoted with approval in *Preston v. Finley*, 72 Fed. 850, 859; *Campbell*

*v. Chicago, etc. R. Co.*, 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443; *McNaughton v. McGirl*, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367.

tible of almost infinite division, and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.”<sup>60</sup>

**§ 774. License tax on those engaged in exporting and importing.**

In the language of the Supreme Court of the United States: “No state can tax an import or export as such except under the limitations of the constitution. But before the article becomes an export or after it ceased to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton broker may be required to pay a tax upon his business, or, by way of license, although he may buy and sell cotton for foreign exportation.”<sup>61</sup>

60. 9 Wheat. (U. S.) 1, 199, 6 L. Ed. 678.

61. Nathan v. Louisiana, 8 How. (U. S.) 73, 81, 12 L. Ed. 992.

Thus a tax on money and exchange brokers is valid as applied to one dealing exclusively in foreign exchange. Here it was decided that the tax was for the privilege of carrying on the business and was not imposed upon the bills of exchange as such.<sup>62</sup>

So a license tax on residents of the state engaged in packing or canning oysters for sale or transportation was declared valid. Here it was held that the tax was imposed for the prosecution of the business within the jurisdiction of the state, and the fact that the oysters were prepared for transportation did not constitute a tax on interstate commerce.<sup>63</sup>

### § 775. License tax for privilege of selling goods, etc.

In accordance with the principles above outlined, state laws and municipal ordinances imposing a license tax for the privilege of carrying on trades, occupations, etc., are uniformly held invalid, where they interfere with or regulate interstate or foreign commerce. Thus a state law of Tennessee was declared void which imposed a license tax on "all drummers and all persons not having a regular licensed house of business in the taxing district," who should offer for sale or sell goods, wares or merchandise therein by sample. "This kind of taxation," remarked the court, "is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way,

62. *Nathan v. Louisiana*, 8 bank v. U. S., 181 U. S. 283, 21 How. (U. S.) 73, 81, 12 L. Ed. 992. Sup. Ct. 648, 45 L. Ed. 862.

When tax on foreign bills of lading is tax on exports, see *Fair-* 63. *State v. Applegarth*, 81 Md 293, 31 Atl. 961, 28 L. R. A. 812.

impose restrictions on interstate commerce for the benefit and protection of its own citizens we are brought back to the condition of things which existed before the adoption of the constitution and which was one of the principal causes which led to it.”<sup>64</sup>

The doctrine of this case has been repeatedly affirmed by the Supreme Court of the United States in holding void state laws and municipal ordinances, seeking to impose a license tax on nonresident (of state) drummers and commercial agents, selling by sample.<sup>65</sup> Therefore, the law is firmly established that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to the Congress.<sup>66</sup>

#### § 776. Same—discrimination is not the test.

The fact that the local law by its terms is made applicable to all of the class, as drummers or commercial travelers or those going from place to place selling goods by sample, does not save it from being invalid under the interstate commerce clause of the constitution. Numerous decisions of state courts prior to the decision of the United States Supreme Court in *Robbins v. Shelby County Taxing District*,<sup>67</sup> held that if the law was free from discriminating features it was valid.

64. *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, per Mr. Justice Bradley.

65. *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35

L. Ed. 649; *Stoutenburgh v. Henrick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368.

66. *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

67. 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

Concerning this point the Federal Supreme Court observed: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states: that all are taxed alike. But that does not meet the difficulty. *Interstate commerce cannot be taxed at all*, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the State Freight case.<sup>68</sup> The negotiations of the sale of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in one case it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."<sup>69</sup>

The fact that such ordinance was held by the state courts to be enacted in the exercise of the police power does not relieve the Supreme Court of the United States of the duty of declaring it void where it is in fact, or in effect, an interference or burden on the lawful commerce between the citizens of the states. Any tax on the occupation is a restriction on the right to sell and is forbidden by the Federal Constitution.<sup>70</sup>

§ 777. Same—where goods sold are in the state.

A license tax imposed for the privilege of doing business by the state or a municipality on all peddlers, hawkers, drummers and itinerant venders, which operates uniformly upon all persons engaged in the same kind of business, whether residents or nonresidents of the state,

68. Philadelphia, etc. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 232, 21 L. Ed. 146.

69. Robbins v. Shelby County Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694.

70. Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; State v. Agee, 83 Ala. 110, 3 So. 856.

is valid, where the goods sold are at the time of the sale within the state and have become a part of the property of the state.<sup>71</sup> As soon as the goods are in the state and become a part of its general mass of property they will become liable to be taxed in the same manner as other property of similar character.<sup>72</sup> Interstate goods become a part of the general mass of state property on a breaking of the original package after reaching the state.<sup>73</sup> But opening a package merely for inspection does not change its original character.<sup>74</sup>

An ordinance requiring persons who engage on their own account in a "commercial street brokerage business," in the course of which they take orders for goods to be filled by nonresident dealers and resell any goods rejected after their arrival in the state is not void nor in conflict with interstate commerce.<sup>75</sup>

71. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430.

An ordinance imposing a license upon itinerant merchants, as applied to one who purchases for resale bankrupt stocks in whatever state he can obtain them, is not invalid as a regulation of commerce. *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837.

72. *Georgia*. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; *Kehrer v. Stewart*, 117 Ga. 969, 44 S. E. 854.

*Idaho*. In re Kinyon, 9 Ida. 642, 75 Pac. 268.

*Iowa*. *Merchant's Transfer Co. v. Board of Review*, 128 Iowa 732, 105 N. W. 211, 2 L. R. A. (N. S.) 662.

*Tennessee*. *American Steel & Wire Co. v. Speed*, 110 Tenn. 524,

75 S. W. 1037, 100 Am. St. Rep. 814; *Darnell v. Memphis*, 116 Tenn. 424, 95 S. W. 816.

*Virginia*. *Standard Oil Co. v. Fredericksburg*, 105 Va. 82, 52 S. E. 817.

*United States*. *Am. Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 498, 7 Sup. Ct. 592, 30 L. Ed. 694; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

73. *Croy v. Obion County*, 104 Tenn. 525, 58 S. W. 235, 51 L. R. A. 254; *Commonwealth v. Rearick*, 26 Pa. Super. Ct. 384.

74. *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 N. W. 888.

75. *Walton v. Augusta*, 104 Ga. 757, 30 S. E. 964; case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, referred to and distinguished,

But a tax on goods sold by an auctioneer, so far as it applies to goods from a foreign state, sold in the original package of the importer before they become mingled with the property of the country, is an interference with interstate commerce and is invalid.<sup>76</sup> And where the goods manufactured by a nonresident are sold by the agent on the instalment plan and are to be delivered afterwards by the agent, the agent cannot be subjected to a license tax.<sup>77</sup>

### § 778. Same—same—peddlers.

Many cases have been presented where peddlers and itinerant venders of goods manufactured in a state other than that in which they were being sold have opposed the payment of a license tax, imposed by statute or ordinance upon the ground that it was an interference with interstate commerce and therefore void as to goods manufactured in another state. But the courts have held such statutes and ordinances valid where it was found that at the time the sale made the goods were in the state,<sup>78</sup> as where a peddler going from place to place within the state carries the goods along with him.<sup>79</sup>

76. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

77. *In re Spain*, 47 Fed. 208; *Huntington v. Mahan*, 142 Ind. 695, 42 N. E. 463.

78. *Indiana. South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315.

*Kansas. In re Pringle*, 67 Kan. 364, 72 Pac. 864.

*Michigan. People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *Muskegon v. Zeeryp*, 134 Mich. 181, 96 N. W. 502.

*North Dakota. In re Lipschitz*, 14 N. D. 622, 95 N. W. 157.

*Pennsylvania. Commonwealth v. Rearick*, 26 Pa. Sup. Ct. 384.

*United States. Haynes v. Briggs*, 41 Fed. 468.

79. *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, following *Machine Co. v. Gage*, 100 U. S. 676; *Commonwealth v. Harmel*, 166 Pa. St. 89, 30 Atl. 1036.

Where the goods are ordered in the name of the agent and when received and delivered by him to the purchaser. *Croy v. Obion County*, 104 Tenn. 525, 58 S. W. 235.

Where the manufactured goods are sent into another state, in car load lots, and agents take the same in small quantities from a central warehouse and carry them about the country, selling them and delivering them direct to purchasers, such agents are not engaged in selling goods by sample.<sup>80</sup>

Where goods are previously contracted by the importer or his agent and are shipped and received in a single package and that package is broken up and its contents distributed among the several purchasers, the goods are not entitled to the protection of interstate commerce.<sup>81</sup>

The state may not only tax the property if it be within its jurisdiction at the time of the sale, but also the occupation of selling it, or it may authorize a municipal corporation to do so. A tax or license levied upon the property itself or on the occupation of selling it when such property is actually present within the jurisdiction exercising such authority is not in any sense an interference with interstate or foreign commerce.<sup>82</sup>

A statute which provided for the levy and collection of an occupation tax from every person or firm who peddles out clocks or cooking stoves was held valid, and not in conflict with the commerce act. *Ex parte Butin*, 28 Tex. App. 304, 13 S. W. 10.

80. *American Harrow Co. v. Shaffer*, 68 Fed. 750.

81. *Kimmel v. State*, 104 Tenn. 184, 56 S. W. 854; *Austin v. State*, 101 Tenn. 563, 48 S. W. 305.

Property subject to license tax. Cigarettes put up in small boxes, bearing internal revenue stamps, which are shipped from one state to another, the boxes constitute original packages; but when they reach their place of rest for final disposal, and remain there until

sold to customers, they thereupon become a part of the mass of the property of the state, and become subject to a license tax, such as was placed on all goods of that character. *In re May*, 82 Fed. 422.

82. For various definitions of peddlers and drummers:

*Brookfield v. Kitchen*, 163 Mo. 546, 63 S. W. 825; *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36; *State v. Parsons*, 124 Mo. 436, 27 S. W. 1102; *State v. Smithson*, 106 Mo. 149, 17 S. W. 221; *State v. Emert*, 103 Mo. 241, 15 S. W. 81; *State v. Welton*, 55 Mo. 288; *State ex rel. Barricelli v. Noonan*, 59 Mo. App. 524; *State v. Hoffman*, 50 Mo. App. 585; *State v. Downing*, 22 Mo. App. 504.



The state may require licenses for agents soliciting orders for intoxicating liquors to be sent from another state.<sup>83</sup>

§ 779. Personal contracts—occupation tax.

The exemption of persons and property from a local license tax or control is strictly confined to such persons as are engaged, and to such property as is employed, in interstate or foreign commerce. Commerce, as stated by the United States Supreme Court, in its broad sense, includes intercourse and the means of intercourse, as applied to trade.<sup>84</sup> The term commerce does not include personal contracts although made between those residing in different states, as contracts of street brokers,<sup>85</sup> and insurance contracts,<sup>86</sup> of fire,<sup>87</sup> marine,<sup>88</sup> or mutual life.<sup>89</sup> The making of contracts of this character is held to be a mere incident of the business transacted, and not commerce in and of itself.

The distinction is well illustrated in the following cases, sustaining tax and license laws: a tax imposed upon agents doing business in a state for laundries, located in another state,<sup>90</sup> a law regulating the sale and redemption of transportation tickets;<sup>91</sup> a license imposed upon locomotive engineers, operating or running trains of cars on any railroad in the state;<sup>92</sup> an

83. *Delameter v. South Dakota*, 205 U. S. 93, 51 L. Ed. —, 27 Sup. Ct. 447, affirming 20 S. D. 23, 104 N. W. 537, 8 L. R. A. (N. S.) 774.

84. *Paul v. Virginia*, 8 Wall. (U. S.) 168, 183, 19 L. Ed. 357.

85. *Walton v. Augusta*, 104 Ga. 757, 30 S. E. 964.

86. License law operating directly upon agents of foreign insurance companies held valid. *People v. Thurber*, 13 Ill. 554.

87. *Paul v. Virginia*, 8 Wall. (U. S.) 168, 183, 19 L. Ed. 357.

88. *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 297, 39 L. Ed. 297.

89. *New York Life Ins. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

90. *Smith v. Jackson*, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416.

91. *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 59 N. W. 317.

92. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508.

ordinance imposing a license fee upon a telegraph company upon business done exclusively in the city;<sup>93</sup> and a license for the privilege of doing a general commission business within the state. The fact that much of the business was done on behalf of principals residing without the state and many of the transactions were sales of goods to be shipped into the state, was held not to be an interference with interstate commerce.<sup>94</sup>

An ordinance of the city of Mobile, Ala., which imposed a license tax on all telegraph companies with offices in the city, was held invalid, being an interference with interstate commerce, since its business consisted in transmitting messages to all parts of the United States.<sup>95</sup>

93. *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1004, 38 L. Ed. 871, affirming 56 Fed. 419; *Western Union Tel. Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415; *Postal Tel. & Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

94. *Ficklen v. Shelby Co. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601.

95. *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, reversing *Mobile v. Leloup*, 76 Ala. 401, and overruling *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, which held an ordinance of the city, requiring express and railroad companies doing business in the city and extending beyond the state, to pay an annual license was valid. And in effect overruling a large number of state decisions which were based on *Osborne v. Mobile*. Thus in *W. U. Tel. Co. v. State*, 55 Tex. 314, the court following *Osborne v. Mobile*, held an occupation tax

on an express company graduated according to the business done, regardless of whether it was within or without the state, valid.

And a license tax upon foreign telegraph companies having an agency in the city was upheld in *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1.

And a tax on the gross receipts of a telegraph company for the year next preceding the assessment return was held valid. *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521.

And a license tax imposed on the business of an express company engaged solely in commerce between the states was upheld. *Memphis, etc. v. Nolan*, 14 Fed. 532.

A privilege tax on steamboat agents and agents of railroad companies, having no terminus in the state was upheld. *Lightburne v. Taxing District*, 4 Lea (Tenn.) 219.

# § 780. License tax on brokers, agents, etc., engaged in interstate commerce.

Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves, and where such a tax conflicts with the Constitution of the United States it cannot be any the less invalid because enforced through the form of a personal license.<sup>96</sup> The particular form of the transaction does not always furnish the test in determining whether it constitutes foreign or interstate commerce. Clearly the sale of property of one state to the residents of another state is interstate commerce. It can make no difference whether the sale was negotiated by the principal or an agent or a broker, who has an established place of business, or by a commercial traveler or drummer, who goes from place to place soliciting orders.<sup>97</sup> Thus an ordinance imposing a license tax

96. *Georgia*. *Stone v. State*, 117 Ga. 292, 43 S. E. 740; *Kehrer v. Stewart*, 117 Ga. 969, 44 S. E. 854.

*United States*. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Beitzell v. Dist. of Columbia*, 21 App. Cas. 49; *Stockard v. Martin*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Ex parte Green*, 114 Fed. 959; *Southern Express Co. v. Ensley*, 116 Fed. 756; *Chicago Portrait Co. v. Macon*, 147 Fed. 967.

So it was held that the exaction of a license tax from the importer of goods was a tax on the goods, and therefore in conflict with the constitution. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 425, 444, 6 L. Ed. 678.

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97. Laws and ordinances requiring a license for taking orders and making sales of goods, as drummers selling by sample for principals residing beyond the state, are void. The tax is, in effect, a tax on the goods sold and a state cannot levy a tax on goods not within her jurisdiction.

*Indiana*. *McLaughlin v. South Bend*, 126 Ind. 471, 26 N. E. 185.

*Kansas*. *Ft. Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954.

*Louisiana*. *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904; *Simmons Hdw. Co. v. McGuire*, 39 La. Ann. 848, 2 So. 592.

*Maine*. *State v. Furbush*, 72 Me. 493.

*Nevada*. *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298.

*New York*. *Buffalo v. Reavey*, 55 N. Y. S. 792, 37 App. Div. 228.

*North Carolina*. *State v. Bracco*, 103 N. C. 349, 9 S. E. 404.

upon every traveling merchant, hawker or peddler, who vends goods, wares or merchandise other than the man-

*Pennsylvania.* Port Clinton Borough v. Shafer, 5 Pa. Dist. Ct. 583.

*South Dakota.* State v. Rankin, 11 S. D. 144, 76 N. W. 299.

*Texas.* Talbutt v. State, 39 Tex. Crim. Rep. 64, 44 S. W. 1091.

*Virginia.* Adkins v. Richmond, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583.

*United States.* Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 329, 38 L. Ed. 719, reversing 143 Pa. St. 642, 22 Atl. 893; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; Robbins v. Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Ex parte Hough, 69 Fed. 330; In re Rozelle, 57 Fed. 155; In re Kimmel, 41 Fed. 775; Ex parte Stockton, 33 Fed. 95; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; In re Hennick, 5 Mackey (D. C.) 489.

**Illustrated cases.** A license on "itinerant dealers in fruit trees, vines," etc., so far as it applies to a foreign drummer or traveling agent, selling goods by sample for his principal who is a nonresident, is void. State v. Agee, 83 Ala. 110, 3 So. 856.

An ordinance requiring an agent of a corporation residing in another state to pay a license for selling a picture frame, encasing a picture sold by a corporation on previous orders, is in violation of the interstate commerce provision of the Constitution. Laurens v. Elmore, 55 S. C. 477, 33 S. E. 560.

License tax on persons, other than photographers of the state, who solicit pictures to be enlarged, is void. State v. Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461.

So an act which requires a person who solicits orders for spirituous liquors, to procure a license, is void as applied to a person soliciting orders for the sale of goods to be shipped from points outside of the state. State v. Lichtenstein, 44 W. Va. 99, 28 S. E. 753.

So a license tax imposed by the board of supervisors of San Francisco, on an agent soliciting business in San Francisco for a railroad running from Chicago to New York, but who sold no tickets. McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391.

An ordinance applicable to brokers who represent nonresident principals exclusively is void. Stratford v. Montgomery, 110 Ala. 619, 20 So. 127.

But a tax imposed by a state upon all money and exchange brokers, although the business was limited to foreign bills of exchange, was held not in conflict with interstate commerce. Nathan v. Louisiana, 8 How. (U. S.) 73, 12 L. Ed. 992.

ufactures or productions of the states,<sup>98</sup> or who solicits orders for nonresident principals is void.<sup>99</sup>

But where the business is entirely within the state, a tax imposed upon an agent by the state is valid, though it may incidentally affect interstate commerce.<sup>1</sup> And if business carried on by an agent is both interstate and domestic a tax imposed by the state on the agent is valid.<sup>2</sup>

The delivery of the goods sold is plainly a part of the commercial transaction. Thus the occupation of delivering goods, as books, sold by a resident or corporation of one state to those in another, cannot be licensed by the state or municipal corporation, since this is clearly an interference with an interstate commercial transaction.<sup>3</sup>

98. *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699.

To license a person peddling tea the growth of foreign country is in conflict with Federal Constitution. *State v. Pratt*, 59 Vt. 590, 9 Atl. 556.

99. *Alabama. Ex parte Murray*, 93 Ala. 78, 8 So. 863.

*Georgia. Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, 11 S. E. 233.

*Indiana. Martin v. Rosendale*, 130 Ind. 109, 29 N. E. 410.

*Michigan. People v. Bunker*, 128 Mich. 160, 87 N. W. 90.

*Mississippi. Overton v. Vicksburg*, 70 Miss. 558, 13 So. 226.

1. *Georgia. Smith v. Clark*, 122 Ga. 528, 50 S. E. 480.

*Louisiana. State v. Hammond Packing Co.*, 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459.

*Michigan. People v. Voorhis*, 131 Mich. 398, 91 N. W. 624.

*North Carolina. Collier v. Burgin*, 130 N. C. 632, 41 S. E. 874.

2. *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663.

3. *Huntington v. Mahan*, 142 Ind. 695, 42 N. E. 463; *In re Tuerman*, 48 Fed. 167; *In re Nichols*, 48 Fed. 164; *In re White*, 43 Fed. 913; *Bloomington v. Bourland*, 137 Ill. 534, 27 N. E. 692; *Baxter v. Thomas*, 4 Okla. 605, 46 Pac. 479.

Goods sold on the instalment plan are also exempted. *In re Spain*, 47 Fed. 208.

*Contra.* Ordinance passed by virtue of legislative grant imposing tax on goods, etc., not the product of the state, sold on commission by any person residing in the city, held to be a legitimate exercise of the power of the state to regulate its internal commerce, and not an "impost or duty on imports." *Cumming v. Savannah, R. M. Chart.* (Ga.) 26, 28.

State statute imposing license to vend merchandise of nonresidents held valid. *Sears v. Warren County Comrs.*, 36 Ind. 267.

### § 781. Discriminating license tax void.

State statutes and municipal ordinances which discriminate in the license tax imposed by them against persons or productions of other states are uniformly held void, not only because such laws constitute an interference with interstate commerce, but because they also are in violation of the privileges and immunities of citizens in other states, guaranteed by the Federal Constitution.<sup>4</sup> No state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereof, more onerous public burdens or taxes than it imposes upon like products of its territory.<sup>5</sup>

Thus an ordinance requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which the city is situated, to procure a license, discriminates against the citizens

State statute imposing license tax upon all traveling merchants, agents, etc., who sell goods in state by sample and otherwise, to be delivered at future time, held valid. *In re Rudolph*, 6 Sawyer (U. S.) 295, 2 Fed. 65.

4. Const., art. IV, § 2; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; *Ward v. Maryland*, 12 Wall. (U. S.) 418, 20 L. Ed. 449, reversing 31 Md. 279. Compare *Crandell v. Nevada*, 6 Wall. (U. S.) 35, 18 L. Ed. 744; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258; *Fulton v. Norteman*, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. (N. S.) 602.

Ordinances discriminating against nonresident's goods held void. *Ex parte Thornton*, 12 Fed.

538; *Fecheimer Bros. & Co. v. Louisville*, 84 Ky. 306, 2 S. W. 65.

5. *Alabama*. *Vines v. State*, 67 Ala. 73.

*Arkansas*. *Arkansas v. McGinnis*, 37 Ark. 362.

*California*. *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53.

*Massachusetts*. *Commonwealth v. Caldwell*, 190 Mass. 355, 76 N. E. 955.

*South Dakota*. *Ex parte Hawley* (S. D.), 115 N. W. 93; *State v. Zophy*, 14 S. D. 119, 84 N. W. 291.

*United States*. *Tiernan v. Rinker*, 102 U. S. 123, 26 L. Ed. 103; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Ex parte Hull*, 153 Fed. 459.

and products of other communities, and is unconstitutional.<sup>6</sup> So a law authorizing the withholding of a peddler's license from the citizens of other states, is an unconstitutional discrimination, and therefore void.<sup>7</sup> Thus an ordinance which prohibits nonresidents from peddling or selling goods from house to house without a license and which fixes such license tax at such sum, as in effect, to make it prohibitory, and, which in terms, excepts residents of the municipality from its operation is void.<sup>8</sup> So an ordinance regulating the sale of farm product, making exceptions in favor of residents of the state, was held discriminating and void.<sup>9</sup> So an ordinance which imposed a license tax upon all persons selling meat except of their own raising, is void.<sup>10</sup> So a law which excepts peddlers residing in the county from

6. *Indiana*. *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62; *Graffy v. Rushville*, 107 Ind. 502, 8 N. E. 609.

*Iowa*. *Marshalltown v. Blum*, 58 Iowa 184, 12 N. W. 266, 43 Am. St. Rep. 116.

*Ohio*. *Redebough v. Plain City*, 11 Ohio Dec. 613.

*United States*. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Rodgers v. McCoy*, 6 Dak. 238, 44 N. W. 990.

7. *Bliss's Petition*, 63 N. H. 135.

A statute prohibiting the sale of any intoxicating liquors, except for medicinal or chemical purposes, as applied to a sale by the importer, and in the original or unbroken packages manufactured in and brought from another state, was held void, being repugnant to the commerce clause of the Federal Constitution. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

8. *Sayre Borough v. Phillips*, 148 Pa. St. 482, 24 Atl. 76.

Ordinance discriminating in amount of license tax against nonresidents void. *Pacific Junction v. Dyer*, 64 Iowa 38, 19 N. W. 862; *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837; *State (Morgan) v. Orange*, 50 N. J. L. 389, 13 Atl. 240; *State v. Wiggins*, 64 N. H. 508, 15 Atl. 128.

Discriminating against vendors of patented articles. *In re Sheffield*, 64 Fed. 833.

9. *Buffalo v. Reavey*, 55 N. Y. S. 792; *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385.

10. *Georgia Packing Co. v. Macon*, 60 Fed. 774.

A statute which discriminates in favor of purchases from wholesale dealers, resident in the state, and against purchases from nonresidents is void. *Albertson v. Wallace*, 81 N. C. 479; *Sinclair v. State*, 69 N. C. 47.

its operation is void.<sup>11</sup> And an ordinance imposing a tax on every agency of nonresident breweries doing business in the state, being a discrimination in favor of domestic breweries, is void.<sup>12</sup> But an ordinance imposing a license tax upon all dealers in beer or ale by the cask, which was not manufactured in the city but brought there for sale, was held valid, there being no evidence in the case to show that the beer sold was manufactured outside of the state, and therefore not subject to the regulation of commerce.<sup>13</sup>

### § 782. License tax under police power.

Where the object is not to derive revenue but to protect the public against imposition the tax will be sustained under the general police power, but in the exercise of such power no interference with interstate or foreign commerce will be permitted.<sup>14</sup> Thus an ordinance prohibiting the business of peddling within the municipal limits, without a license from the proper municipal officer, would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is clear that a police regulation must be directed against a business or practice that is harmful, and which may in some way

11. *Commonwealth v. Snyder*, 182 Pa. St. 630, 38 Atl. 356; *Rodgers v. Kent Circuit Judge*, 115 Mich. 441, 73 N. W. 381; *Marshalltown v. Blum*, 58 Iowa 184, 12 N. W. 266.

12. *Cullman v. Arndt*, 125 Ala. 581, 28 So. 70; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857.

13. *Downham v. Alexandria*, 10 Wall. (U. S.) 173, 19 L. Ed. 929.

14. *Commonwealth v. Crowell*, 156 Mass. 215, 30 N. E. 1015; *Arnold v. Yanders*, 56 Ohio St. 417,

47 N. E. 50; *Commonwealth v. Harmel*, 166 Pa. St. 89, 30 Atl. 1036; *Thompson v. State*, 17 Tex. App. 253.

An act to license and regulate the business of commission merchants, etc., held not to be in conflict with the power to regulate commerce, and as an act designed to prevent false and fraudulent practices was a valid exercise of the police power. *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134.



injuriously affect the peace, good order, health, morality, or safety of society.<sup>15</sup>

Statutes and ordinances imposing a license upon itinerant vendors of drugs and proprietary medicines have been held not in conflict with the power of the Congress to regulate commerce, but a valid exercise of the police power, intended to restrain the sale of nostrums by itinerants who profess knowledge of the art of healing in order to make sales.<sup>16</sup>

Ordinances and statutes requiring peddlers and itinerant vendors of goods to take out a license, have in many instances been held valid where the goods sold were manufactured in another state, upon the ground that the imposing of a license was a valid exercise of the police power of the state, to protect its citizens against fraud and imposition. However, in most cases of this kind where the constitutional question of interference with interstate commerce was raised, because the goods were manufactured in another state, it was found that the goods were carried along with the peddler and delivered at the time the sale was made, and the goods being in the state and not sold in the original package, were, therefore, subject to the taxing power of the

15. *Sayre Borough v. Phillips*, 148 Pa. St. 428, 24 Atl. 76; *Pabst Brewing Co. v. Terre Haute*, 98 Fed. 330.

A statute of the state of Texas which imposed an occupation tax of \$500.00 upon every person, firm, or association engaged in selling the "Sunday Sun," the "Kansas City Sunday Sun," or other publications of like character, was held valid, as a police regulation, and not invalid as a regulation of interstate commerce. *Preston v. Finley*, 72 Fed. 850.

16. *State v. Wheelock*, 95 Iowa 577, 64 N. W. 620; *Commonwealth v. Newhall*, 164 Mass. 338, 41 N. E. 647.

A statute of West Virginia, requiring every person practicing medicine in the state to obtain a certificate from the state board of health was upheld upon the ground that it was within the power of the state to secure its citizens against the consequences of ignorance and incapacity, as well as of deception and fraud. *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623.

state.<sup>17</sup> But where the license tax imposed is, in effect, a tax on the goods of another state, and is, therefore, an interference with interstate commerce, as an ordinance imposing a license tax upon persons soliciting orders for books, the orders to be filled by a principal in another state;<sup>18</sup> or, on each brewery depot of non-resident breweries;<sup>19</sup> or, on any person desiring to deal in convict-made goods when imported from another state,<sup>20</sup> it is void and cannot be upheld as a valid police regulation.

An act imposing a license for the purpose of discouraging the use of intoxicating liquors and for the preservation of the health and morals of the people, cannot be justified as a police regulation, where it discriminates against the citizens and products of other states.<sup>21</sup> By an Act of Congress of August 8, 1890, intoxicating liquors were made subject to the police regulations of the state into which they are transported.<sup>22</sup>

17. *State v. Smithson*, 106 Mo. 149, 17 S. W. 221; *Singer Manufacturing Co. v. Wright*, 33 Fed. 121; *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352; *Rash v. Farley*, 12 Ky. L. Rep. 913, 15 S. W. 862; *State v. Richards*, 32 W. Va. 348, 9 S. E. 245.

18. *In re Nichols*, 48 Fed. 164.

19. *Pabst Brewing Co. v. Terre Haute*, 98 Fed. 330.

20. *Arnold v. Yanders*, 56 Ohio St. 417, 47 N. E. 50.

21. *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691.

22. *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Commonwealth v. Calhane*, 154 Mass. 115, 27 N. E. 881; *Indian-*

*apolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269.

It was held in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, that under the act of Congress the state legislature did not affect the goods until the act of transportation had been completed and the goods had arrived at the point of destination and had been delivered to the consignee. There was, however a dissenting opinion written by Mr. Justice Gray, and concurred in by Justices Harlan and Brown, which held that the laws of the state attached immediately upon the entry of the liquor into the state.

### § 783. Same—telephone and telegraph poles in street.

A city may by ordinance impose a license tax upon poles and wires of a telegraph company erected and maintained in its streets within the city, to cover the expense of the enforcement of its police regulations and the necessary expense to which it is put by reason of the existence of such poles and wires, although the company is a corporation of another state and is engaged in interstate commerce.<sup>23</sup>

In one case the Supreme Court of the United States held that a charge imposed by ordinance for the use and occupation of the streets at so much per pole was in the nature of a rental or compensation for the space in the streets thus exclusively appropriated. "Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, not is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.'<sup>24</sup> \* \* \* That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax."<sup>25</sup>

23. *Kentucky*. Postal Tele. Cable Co. v. Newport, 25 Ky. L. Rep. 635, 76 S. W. 159.

*New York*. Philadelphia v. Postal Tel. Cable Co., 21 N. Y. S. 556, 66 Hun (N. Y.) 633, 67 Hun (N. Y.) 21.

*Pennsylvania*. Taylor v. Postal Cable Tele. Co., 202 Pa. St. 583, 52 Atl. 128; Chester v. Western Union Telegraph Co., 3 Lanc. Law Rev. (Pa.) 164; Chester v. W. U. Tel. Co., 154 Pa. St. 464, 25 Atl. 1134.

*United States*. Philadelphia v. Western Union Tel. Co., 89 Fed. 454; Philadelphia v. W. U. Tel. Co., 40 Fed. 615; Postal Tel. Cable

Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; Western Union Tele. Co. v. New Hope, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240; Atlantic & Pac. Tele. Co. v. Philadelphia, 190 U. S. 160, 47 L. Ed. 995, 23 Sup. Ct. 817.

24. State Freight Tax Case, 15 Wall. (U. S.) 232, 278, 21 L. Ed. 146.

25. Per Mr. Justice Brewer, J., in St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, reversing 39 Fed. 59, which held the charge to be a privilege or license tax.

Whether the charge be called a license tax for the privilege of erecting its poles, or whether, as held in the above case, it is termed a rental for the use of the space occupied, it has been clearly decided that it is within the power of a municipality to impose such a tax, although telegraph and telephone companies are Federal agencies and engaged in interstate commerce.<sup>26</sup>

But the charge which the city is allowed to impose must be reasonable, that is, it must not be in excess of a reasonable compensation for the space in its streets thus exclusively appropriated, together with a sufficient sum to pay for the necessary inspection and care upon the part of the city to insure the public safety.<sup>27</sup> An ordinance imposing a tax of one dollar per pole and two dollars and fifty cents per mile on each mile of wire, was held, under the circumstances, a reasonable charge.<sup>28</sup>

26. *Union Pac. Co. v. Peniston*, 18 Wall. (U. S.) 5, 30, 21 L. Ed. 787; *Philadelphia v. W. U. Tel. Co.*, 82 Fed. 797; *Allentown v. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070; *Philadelphia v. American U. Tel. Co.*, 167 Pa. St. 406, 31 Atl. 628; *Philadelphia v. Postal Tel. Cable Co.*, 21 N. Y. S. 556, 67 Hun (N. Y.) 21, 66 Hun (N. Y.) 633.

"It never could have been intended by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of another state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548, 8 Sup. Ct. 961, 31 L. Ed. 790.

27. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Philadelphia v. Western Union Tel. Co.*, 40 Fed. 615; *Philadelphia v. Western Union Tel. Co.*, 89 Fed. 454; *Harrisburg v. Pennsylvania Tel. Co.*, 15 Pa. Co. Ct. 518, 3 Pa. Dist. Co. Rep. 815.

One dollar annually per pole sustained. *Chester v. W. U. Tel. Co.*, 154 Pa. St. 464, 25 Atl. 1134.

Two dollars per pole sustained. *Postal Tel. Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161.

Where the sum charged per pole is enormously greater than the value of the average adjoining property it will be held unreasonable. *St. Louis v. Western Union Tel. Co.*, 63 Fed. 68.

28. *Philadelphia v. Postal Tel. Cable Co.*, 21 N. Y. S. 556, 66 Hun (N. Y.) 633, 67 Hun (N. Y.) 21.

But an ordinance charging more than five times the sum required to pay the cost of supervision and inspection necessary for the protection of property and persons, was held unreasonable and void.<sup>29</sup>

The amount of the charge rests with the municipal council in the first instance and whether the amount imposed is reasonable is a question for judicial determination.<sup>30</sup> And where the discretion of the council in fixing the amount has been manifestly abused the courts are justified in interfering.<sup>31</sup>

#### § 784. Taxation of property employed in interstate or foreign commerce.

It has been repeatedly decided by the Supreme Court of the United States, that when a law of a state or municipality imposes a tax, under such circumstances and with such effect as to constitute it a regulation of commerce, either foreign or interstate, it is void on that account.<sup>32</sup> The fact that the legislative purpose is to raise money for the support of the state or municipal government and not to regulate transportation, will not render such law valid; for it is not the purpose of the law but its effect which is to be considered.<sup>33</sup>

The fundamental proposition involved has been thus comprehensively stated by Mr. Justice Miller: "The

29. *Philadelphia v. Western Union Tel. Co.*, 40 Fed. 615.

30. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

Fifty cents per pole annually. *Lancaster v. Edison E. I. Co.*, 8 Pa. Co. Ct. Rep. 178.

The reasonableness of the charge depends upon the facts in each case and is a proper question to be determined by a jury where it arises in actions at law. *Philadelphia v. Western Union Tel. Co.*, 89 Fed. 454; *Philadelphia v. Atl.*

& P. Tel. Co., 42 C. C. A. 325.

31. *Allentown v. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070; *Philadelphia v. American U. Tel. Co.*, 167 Pa. St. 406, 31 Atl. 628.

32. *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; *Simpson-Crawford Co. v. Atlantic Highlands*, 158 Fed. 372; *Adams v. Mississippi Lumber Co.*, 84 Miss. 23, 36 So. 68.

33. *State Freight Tax Cases*, 15 Wall. (U. S.) 232-276.

question of the taxing power of the states, as its exercise has affected the functions of the federal government, has been repeatedly considered by this court, and the right of the state in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied.”<sup>34</sup> As said by Mr. Justice Matthews: “Otherwise unrestrained by the authority of the Federal Constitution, the taxing power of the states extends to and embraces the persons, property and pursuits of their people; although it is not always easy in particular cases to draw the line which separates the two jurisdictions.”<sup>35</sup>

Although the transportation of the subjects of interstate or foreign commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state or municipal taxation, yet property belonging to individuals, corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be construed as falling within the inhibition of the constitution. Thus property employed in interstate or foreign commerce of express companies,<sup>36</sup> and of telegraph companies,<sup>37</sup> is subject to taxation by the state, or municipal

34. *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 45.

35. *Moran v. New Orleans*, 112 U. S. 69, 74, 5 Sup. Ct. 38, 28 L. Ed. 653. Compare *State Freight Tax Cases*, 15 Wall. (U. S.) 232-276, 21 L. Ed. 146; *State Tax on Railway Receipts*, 15 Wall. (U. S.) 284, 21 L. Ed. —; *Osborne v. Mobile*, 16 Wall. (U. S.) 479, 21 L. Ed. 470; *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429.

36. *Adams Express Co. v. Ohio*, 165 U. S. 194; *Adams Express Co. v. Ohio*, 166 U. S. 185; *American Union Express Co. v. St. Joseph*, 66 Mo. 675.

37. Tax on property of a telegraph company held to be essentially an excise tax, and not forbidden by the commerce clause of the constitution.

*Montana. State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311.

*Virginia. Postal Cable Telegr. Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

*United States. Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360,

corporation under delegated authority. So where a corporation of one state brings into another state, to use and employ, a portion of its movable property, it is competent for the latter state to impose upon the property thus used and employed, its fair share of the burden of taxation imposed upon similar property used in like manner by its own citizens. The fact that such property, as railroad cars, is employed as vehicles of transportation for the interchange of interstate commerce does not render their taxation invalid.<sup>38</sup>

It has often been judicially declared by the Supreme Court of the United States that vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of Congress, may be taxed by state authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry, and

39 L. Ed. 311; *Massachusetts v. Western Union*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Western Union Teleg. Co. v. Missouri*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, 165 Mo. 502.

38. *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708; *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041.

*Kentucky. Covington v. Pullman Co.*, 121 Ky. 218, 28 Ky. L. Rep. 188, 89 S. W. 116.

*Missouri. State v. Wiggins Ferry Co.*, 208 Mo. 622, 106 S. W. 1005.

Such a tax may be properly assessed and collected when the specific and individual items of prop-

erty so used, as railroad cars, were not continuously the same, but were constantly changing according to the exigencies of the business, and the tax may be fixed in proportion to the value of the average amount of the property thus habitually used and employed. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899.

Method of ascertaining assessed value of railroad company. *Pittsburgh, etc. Ry. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

Imposing a tax on those engaged in the transportation of passengers and freight between states, levied on the capital stock of the corporation, proportionately, etc., held valid. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

is valued as other property in the state, without unfavorable discrimination on account of its employment.<sup>39</sup>

### § 785. License tax on foreign corporations.

Corporations are not citizens within the meaning of the Constitution of the United States declaring that, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."<sup>40</sup> Therefore, a state is not prohibited from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits.<sup>41</sup> But a state cannot, under the guise of a license

39. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419; *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. Ed. 412; *Morgan v. Parham*, 16 Wall. (U. S.) 471; 21 L. Ed. 303; *Hays v. Pac. Mail Steamship Co.*, 17 How. (U. S.) 596, 15 L. Ed. 254.

A state law requiring vessels to file a statement in writing in the office of the probate judge of the county, setting forth the name of the vessel, the name, place of residence and the interest of each owner in the vessel, under a penalty for non-compliance, held void as applied to vessels engaged in interstate or foreign commerce, and which had taken out a license and were duly enrolled under the act of congress for carrying on the coasting trade. *Sinnot v. Davenport*, 22 How. (U. S.) 227, 243; 16 L. Ed. 243; *Foster v. Davenport*, 22 How. (U. S.) 244, 16 L. Ed. 248.

40. *Delaware. Caldwell v. Armour*, 1 Penn. (Del.) 545, 43 Atl. 517.

*Georgia. Aetna Ins. Co. v. Brigham*, 120 Ga. 925, 48 S. E. 348.

*Illinois. In re Speed*, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189.

*Kentucky. Commonwealth v. Milton*, 12 B. Mon. (Ky.) 212.

*New Jersey. Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33.

*Ohio. Humphreys v. State*, 70 Ohio St. Rep. 67, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888.

*Pennsylvania. List v. Commonwealth*, 118 Pa. 322, 12 Atl. 277.

*United States. Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Warren Mfg. Co. v. Aetna Ins. Co.*, 28 Fed. Cas. No. 17,206, 2 Paine 501.

41. *Arkansas. Western Union Tel. Co. v. State*, 82 Ark. 309, 101 S. W. 748.

*Colorado. American S. & R. Co. v. People*, 34 Colo. 240, 82 Pac. 351, 531.



tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce.<sup>42</sup>

While the general right of a state to prescribe the terms and conditions on which a foreign corporation may do business therein is unquestioned, the state may not restrict or regulate the interstate commerce in which such corporation is engaged.<sup>43</sup> Corporations engaged in

*Kansas.* State v. Western Union Tel. Co., 75 Kan. 609, 90 Pac. 299; State v. Pullman Co., 75 Kan. 664, 90 Pac. 319.

*Massachusetts.* Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467.

*Mississippi.* Clarksdale Insurance Agency v. Cole, 87 Miss. 637, 40 So. 228.

*Nebraska.* State v. Insurance Co. of North America, 71 Neb. 320, 99 N. W. 36; State v. Fleming, 70 Neb. 523, 97 N. W. 1063.

*North Carolina.* Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

*Tennessee.* Loverlin Brown & Co. v. Tansil, 118 Tenn. 717, 102 S. W. 77.

*Virginia.* American Surety Co. v. Commonwealth, 102 Va. 841, 47 S. E. 994.

*United States.* Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Philadelphia Fire Assn. v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93.

An annual tax on a railroad company for the privilege of exercising its franchise therein to be determined by the amount of its gross transportation receipts, is not in conflict with the Federal

constitutional provision relating to interstate commerce. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.

A license upon an express company doing business in Florida, which applies solely to business of the company within the state, is not an interference with interstate commerce. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586.

42. *Norfolk Ry. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394.

The exacting of a license fee to enable a corporation to have an office in another state, is a proper subject for license and is not in violation of interstate commerce. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

43. *Attorney General v. Electric Storage Battery Co.*, 188 Mass. 239, 74 N. E. 467; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; *Norfolk Western R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871.

interstate commerce, as well as individuals, are entitled to the protection of the commerce clause.<sup>44</sup>

**§ 786. Cannot regulate or tax operations or objects of interstate or foreign commerce.**

Neither a state nor its municipal corporation can regulate or tax the operations or objects of interstate or foreign commerce. The following have been held to be attempts to regulate or interfere with interstate commerce: Attempts to regulate the delivery of telegraph messages in another state;<sup>45</sup> attempt to regulate the charge for the transportation of passengers and freight begun within the state but extending into other states;<sup>46</sup> imposing a license tax upon telegrams, passing over wires extending through more than one state;<sup>47</sup> laying a tax upon every person passing through or out of the state;<sup>48</sup> imposing a tax upon the gross receipts of a steamship company engaged in the transportation of persons and property by sea between different states;<sup>49</sup> imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York and seeking to hold the vessel liable for

44. *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 58; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 394; *Postal Telegraph Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167.

45. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

An ordinance prohibiting the transmission of telegraphic messages to pool rooms within the city is not an interference with interstate commerce, though such messages come from another state. *Louisville v. Wehmoff*, 116

Ky. 812, 25 Ky. L. Rep. 995, 76 S. W. 876; Rehearing denied, 116 Ky. 812, 25 Ky. L. Rep. 1924, 79 S. W. 201.

46. *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

47. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

48. *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. Ed. 744.

49. *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.

such tax,<sup>50</sup> and laying a stamp duty upon bills of lading for gold or silver transported from the state.<sup>51</sup>

Licenses for the privilege of navigation, license and taxation of ferries, wharfage charges as an attempt to regulate or as an interference of foreign or interstate commerce, and wharfage as distinguished from tonnage are all treated elsewhere in this work.<sup>52</sup>

§ 787. Same—property in transit.

Ordinances imposing a license or tax upon personal property while in transit from one state to another or to a foreign port, are void for the reason that such a tax would be, in effect, a tax upon interstate commerce, which as has been seen, cannot be burdened with a tax or license imposed by any state or municipality through which the goods must pass. Thus logs drawn from Vermont and delivered on the ice in the Connecticut River and stored temporarily awaiting transportation as soon as the ice should break in the spring—the purpose being to float the logs down the river to mills in another state—are in commercial transit, and are exempt from state taxation.<sup>53</sup> And where property is brought into the state in the course of transportation and is detained there for a long time; yet if it remained no longer than was necessary under the circumstances, it is in transit and is not subject to be taxed; as where logs, while in the course of transportation on the river, were detained for one summer on account of low water, they

50. *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383, citing and approving *Henderson v. New York*, 92 U. S. 259, 23 L. Ed. 543, and *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Passenger Cases*, 7 How. (U. S.) 283, 408, 12 L. Ed. 702.

51. *A'my v. California*, 24 How. (U. S.) 169, 16 L. Ed. 644.

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State law forbidding nonresidents from taking shell fish from the waters of a particular county is not a violation of the commerce clause. *Brooks & Taylor v. Tripp*, 135 N. C. 159, 47 S. E. 401.

52. §§ 397 to 410 *ante*.

53. *Lumber Co. v. Columbia*, 62 N. H. 286.

were, while there, in transit and not subject to tax.<sup>54</sup> Property in transit through the state, or which has been sent within the state simply for the purpose of sale, is not to be considered as having a *situs* within such state for purposes of taxation. Coal shipped from Pennsylvania and deposited on the wharf in New Jersey for the purpose of separation and assortment, then to be shipped to different places, was held to be in transit.<sup>55</sup>

The commercial transit of the goods is not terminated until the goods reach their destination and are delivered to the consignee.<sup>56</sup> "To bring the transportation within the control of the state, as part of its domestic commerce the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."<sup>57</sup>

While the property is still in the state from which the transportation is to be made, and before the transportation from the state has actually begun it is subject to

54. *Coe v. Errol*, 62 N. H. 303.

Lumber in the port and awaiting shipment to England is not subject to taxation by the state. *Blount v. Munroe*, 60 Ga. 61.

A cargo of corn purchased in Iowa and removed to the railroad station and temporarily stored in cribs to await transportation to Canada, was held to be in transit and exempt from taxation, provided the purchaser intended to ship immediately. *Ogilvie v. Crawford County*, 7 Fed. 745.

Cattle grazing in a state, while in transit on foot to another state are exempt from local taxation under the commerce clause. *Kelley v. Rhodes*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359, reversing 9 Wyo. 352, 63 P. 935, 85 Am. St. Rep. 959.

55. *State v. Engle*, 34 N. J. L. 425; *State v. Carrigan*, 39 N. J. L. 35.

56. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 669, 42 L. Ed. 1088; *Gulf Colo. & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; *Darnell v. Memphis*, 116 Tenn. 424, 95 S. W. 816; *Southern Ry Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82.

In *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, coal which had been shipped from Pennsylvania to New Orleans was held to be subject to tax while remaining on barges to be sold in open market.

57. *Pacific Coast Steamship Co. v. Railroad Commissioners* (U. S.), 9 Sawyer 253; *State v. Chicago, St. Paul & Omaha R. Co.*, 40 Minn. 267; *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 106 Fed. 353, 47 L. Ed. 333.

the taxing power of the state. Thus where the logs have been hauled and placed on the ice in a river to await the opening of the river, then to be floated down to mills in another state, it was held that while awaiting the opening of the river they could not be considered in transit.<sup>58</sup>

### § 788. Local police regulations.

Local police regulations which do not impose restraints upon interstate or foreign commerce and which do not conflict with the power of the Congress under what is called the "commerce clause" of the Constitution of the United States will be sustained. Thus, an ordinance of the City of Chicago forbidding the emission of dense smoke within the corporate limits and directed against steam boats and water craft, plying on the Chicago River, which is a navigable stream under the laws of Congress, although such boats were engaged in interstate commerce, was held valid. Here the ordinance only purported to regulate the use of tug boats in such manner as might not produce effects detrimental to property and business, nor become a personal annoyance to the public at large, within the city.<sup>59</sup>

An ordinance of Philadelphia, general in its nature, limiting the speed of all vehicles used upon the streets

58. *Nelson Lumber Co. v. Lorraine*, 22 Fed. 54.

In *Kelley v. Rhodes*, 7 Wyo. 237, 39 L. R. A. 594, 51 Pac. 593, it was held that a herd of sheep while being driven from Utah through Wyoming to Nebraska, which were allowed to graze and feed upon the natural grasses, were not in transit so as to exempt them from taxation in Wyoming.

59. "Regulating the use of fuel, or, what is the same thing, re-

quiring the owners or managers of tug boats to so use their vessels as not to create a dense smoke, which it is conceded would be an annoyance to the public at large, is in no sense imposing any restraint upon commerce, nor does it in any manner conflict with the power of Congress under what is called the 'commerce clause' of the Constitution of the United States." *Harmon v. Chicago*, 110 Ill. 400, 408, 51 Am. Rep. 698.

was held to apply to vehicles carrying the United States mail. The ordinance conferred power upon the municipal authorities to stop vehicles violating its provisions. The fact that the enforcement of such ordinance might result in a temporary stoppage of United States mails was held to be no objection to its validity.<sup>60</sup>

A state law requiring electric wires to be placed under the surface of the streets is a valid police regulation, as to telegraph companies accepting the act of Congress and which thereby become as to government business, an agency of the general government and which is an instrument of interstate commerce.<sup>61</sup> Obviously the same principle applies to like regulations by municipal ordinances; and such matters must be so regulated where the local corporation has full control of its streets, as in Missouri and other states.<sup>62</sup>

#### § 789. Same—scope of police power.

The extent to which the state may go in the exercise of its police powers and interfere with the power of Congress regulating commerce depends upon the facts of each case. "By the settled doctrine of this court," remarked the Supreme Court of the United States, "the police power extends at least to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own

60. *United States v. Hart, Peters* C. C. (U. S.) 390.

61. *Western Union Tel. Co. v. New York*, 38 Fed. 552, per Wallace, J., where it is said (p. 555), "Such statutes \* \* \* unquestionably belong to the category of police regulations, the power to establish which has been left to the individual states."

The police power of a state does not extend to the regulation of the delivery at points without the

state of telegraphic messages received within the state, but the power may be exercised with regard to its poles and wires so far as is necessary for the comfort and convenience of the community. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

62. *State ex inf. v. Lindell Ry. Co.*, 151 Mo. 162, 183, 52 S. W. 248.

rights. State legislation, strictly and legitimately for police purposes, does not in the sense of the constitution, necessarily intrench upon any authority which has been confided expressly or by implication, to the national government.”<sup>63</sup> “It is well settled that the state may make, valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect on interstate traffic.”<sup>64</sup>

In determining whether or not a police regulation interferes with interstate commerce the court will look into the operation and effect of the statute, to discern its purpose, and if it is found to be a just exercise of the state power it will be sustained; but if it is intended by a roundabout means to evade the domain of Congress over commerce it will be held void.<sup>65</sup>

When exercised for the protection of the lives and health of the people, the police power of a state extends beyond the commercial power of Congress and may be exercised to abate nuisances;<sup>66</sup> to prohibit the continuance of manufactures deemed injurious to the public health;<sup>67</sup> the sale and manufacture of intoxicating drinks;<sup>68</sup> and the maintenance of lotteries, gambling, horse racing or anything else that the legislature may deem opposed to the public welfare.<sup>69</sup> But the state

63. *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115.

This doctrine was approved in *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

See ch. 25 *post*.

64. *Per Day, J., Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 135, 48 L. Ed. 268. Quoted in *Atlantic Coast Line Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911.

65. *Morgan v. Louisiana*, 118 U. S. 455, 462, 6 Sup. Ct. 1114, 23 L. Ed. 860.

66. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

67. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

68. *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

69. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

“It is also within the undoubted province of the state legisla-

when providing by legislation for the protection of the public health, the public morals, or public safety, is subject to the paramount authority of the Constitution of the United States and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government.<sup>70</sup>

To what extent the state may exercise its police power in prohibiting the sale of goods within the state without interference with the commercial power is illustrated by Justice Catron in the License Cases,<sup>71</sup> where in referring to certain articles, the sale of which had been prohibited by the state, he said: "If, from its nature, it does not belong to commerce, or if its condition, from putrescence, or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

A statute of Massachusetts, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter and

ture to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and generally with regard to all operations in which the lives and health of people may be endangered, even though such reg-

ulations affect to some extent the operations of interstate commerce." *Crutcher v. Kentucky*, 141 U. S. 47, 61, 11 Sup. Ct. 851, 35 L. Ed. 649.

70. *Mugler v. Kansas*, 123 U. S. 623, 663, 8 Sup. Ct. 273, 31 L. Ed. 205.

71. 5 How. (U. S.) 504, 599, 12 L. Ed. 256.



brought into Massachusetts, was held not in conflict with the power of Congress to regulate commerce among the several states. The court said: "We are of the opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sales of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public."<sup>72</sup>

#### § 790. Same subject—illustrative cases.

The commerce clause of the Federal Constitution does not deprive a state of the right to restrict, as against a railroad company, the rights of persons injured in the course of their employment on or about the railroad so as to give them no greater rights than employes of the railroad injured under like circumstances.<sup>73</sup>

A statute providing that when shipments are received by a connecting carrier as "in good order" the last company shall be responsible to the consignee for damages thereto is not repugnant to the commerce clause of the Constitution.<sup>74</sup>

A state may impose a penalty on a railroad company for refusal to receive merchandise for transportation, notwithstanding the merchandise is to be shipped out of the state.<sup>75</sup>

A statute regulating the venue of suits against connecting carriers was held a valid exercise of the state's

72. *Plumley v. Massachusetts*, 155 U. S. 461, 479, 15 Sup. Ct. 154, 39 L. Ed. 223; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

73. *Martin v. Pittsburg & L. E.*

*Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184.

74. *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 526.

75. *Currie v. Raleigh & A. Air Line R. Co.*, 135 N. C. 535, 47 S. E. 654.

police power and not invalid as to an interstate carrier.<sup>76</sup>

A state may require railroad companies to operate separate passenger service within the state, in the exercise of its police power.<sup>77</sup>

A rule promulgated by the state corporation commission requiring railroad companies to furnish cars required by shippers, upon a certain number of days application, and providing for a forfeiture for each day's default was held void as to shipments to points outside the state.<sup>78</sup>

An ordinance limiting the speed of trains within the corporate limits for the safety of the public is valid.<sup>79</sup>

Railroad ticket scalping may be prohibited by the state for the protection of travelers from fraud.<sup>80</sup>

The state may require an interstate railroad company to trace freight delivered by it to a connecting carrier.<sup>81</sup>

A territory may, in the exercise of its police power, prohibit common carriers from receiving for transportation, beyond the limits of the territory, hides which do not bear the required evidence of inspection.<sup>82</sup>

### § 791. Same—quarantine laws.

It seems that a state in the exercise of its police power to prevent the spread of infectious or contagious diseases may empower a board of health to *exclude healthy*

76. St. Louis Southwestern Ry. Co. v. Wester (Tex. Civ. App.), 96 S. W. 769.

77. State v. Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

78. Southern Ry. Co. v. Commonwealth, 107 Va. 771, 60 S. E. 70; McNeill v. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142. See also Texas & Pac. Ry. Co. v. Allen, — Tex. Civ. App. —, 98 S. W. 450; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772.

79. Chicago & Alton R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391.

80. State v. Thompson, 47 Ore. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480; State v. Bollam, 47 Ore. 639, 84 Pac. 479.

81. Central of Georgia Ry. Co. v. Murphy, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817.

82. New Mexico ex rel. v. Denver & R. G. R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78.

persons from a locality infested with a contagious disease, and to prevent *well persons* seeking to enter the infected place from entering, whether they come from within or without the state. A recent authoritative utterance of the United States Supreme Court on this subject is: "The health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to regulate incidentally by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to prohibit absolutely additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce."<sup>83</sup>

Prior to this decision in considering a quarantine law of the State of Texas, Mr. Chief Justice Fuller observes: "While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution, and that where the action of the states in the exercise of their reserve pow-

83. *Compagnie Francaise, etc. v. Louisiana State Board of Health*, 186 U. S. 380, 391, 22 Sup. Ct. 811, 46 L. Ed. 1209, per Mr. Justice

White. Mr. Justice Brown delivered a dissenting opinion, pp. 397-401, concurred in by Mr. Justice Harlan.

ers comes in collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government.”<sup>84</sup>

In holding that a statute which prohibited the driving or conveying of Texas, Mexican or Indian cattle into a state, during a certain period of the year, was in conflict with interstate commerce, and was not a legitimate exercise of the police power, nor a quarantine regulation, Mr. Justice Strong said: “While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with the transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not under the cover of exerting its police powers substantially prohibit or burden either foreign or interstate commerce.”<sup>85</sup>

## § 792. Same subject.

An ordinance of the City of St. Louis enacted under the authority of the city to make quarantine regulations

84. *Louisiana v. Texas*, 176 U. S. 1, 21, 20 Sup. Ct. 251, 44 L. Ed. 347.

85. *Railroad Co. v. Husen*, 95 U. S. 465, 472, 24 L. Ed. 527, quoted with approval in dissenting opinion in *Compagnie Francaise, etc. v. Board of Health*, 186 U. S., pp. 399, 400, 22 Sup. Ct. 811, 46 L. Ed. 1209. The subject is discussed in *Bangor v. Smith*, 83 Me.

422, 22 Atl. 379; *State v. Steamship Constitution*, 42 Cal. 578.

A statute which provides that one having in his possession “Texas cattle” shall be liable for any damage which may accrue from allowing them to run at large and thereby spread the disease known as “Texas fever,” held valid in *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. Ed. 695.

for the preservation of the health of its citizens, which prescribed that boats coming from below Memphis on the Mississippi River, and carrying more than a specified number of passengers should be detained at the quarantine, for the purpose of inspection and to guard against introducing into the city diseases and pestilences, was held valid and not in repugnance to that clause of the Federal Constitution which reserves to Congress the exclusive right to regulate commerce.<sup>86</sup> "Whatever exclusiveness may be claimed for the power to regulate commerce, conferred upon Congress by the Constitution of the United States, it is conceded that the power exists in the different states to protect their own citizens against the introduction of disease by the enactment of quarantine laws, although such laws will inevitably interfere to some extent with commerce."<sup>87</sup>

It is the settled construction of every regulation of commerce, that under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety.<sup>88</sup> And it is conceded that a state has power to pass quarantine laws and other restraints which shall be required to protect the health of its citizens, and laws passed expressly for such purposes, have been held not to be a regulation of commerce.<sup>89</sup> Thus the requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the Constitution concerning tonnage tax.<sup>90</sup>

86. *St. Louis v. McCoy*, 18 Mo. 238, approved in *St. Louis v. Boffinger*, 19 Mo. 14.

87. Per Judge Gamble, *St. Louis v. Boffinger*, 19 Mo. 13.

88. *License Cases*, 5 How. U. S.) 504, 589, 12 L. Ed. 256.

89. *Gibbons v. Ogden*, 9

*Wheat* (U. S.) 1, 205, 6 L. Ed. 678; *New York v. Miln*, 11 Pet. (U. S.) 102, 142.

90. *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237.

In *Peete v. Morgan*, 19 Wall. (U. S.) 581, 22 L. Ed. 201, it was

### § 793. Harbor and local police regulations.

Although United States courts have exclusive jurisdiction of maritime torts, states may confer upon municipalities, where navigable waters and harbors exist, police authority over them, and a violation of any regulation the municipal authorities should adopt, if within the power conferred, would be within the jurisdiction of the state courts. "The state, or its municipalities under it, may pass all laws or ordinances for their government not in conflict with the Constitution of the United States or the laws of Congress enacted within its constitutional powers. The Federal government, under its power to regulate commerce between the states, may, no doubt, take into its hands the construction and improvement of the harbors within the states. But this power does not prohibit the state from doing the same thing, for the purpose of its internal commerce. \* \* \* In case of conflict, no doubt the state laws must yield to the law of Congress. But until such conflict arises the state law is valid and unimpeachable." Thus ordinances under charter power, imposing penalties for depositing, etc., certain substances in a river, or the canals, raceways, etc., leading into it are valid.<sup>91</sup> So an act regulating the speed of steamboats when passing the wharves of a city is a valid police regulation, enacted to guard against endangering the lives and property of individuals.<sup>92</sup>

held that a state could not for the purpose of defraying the expenses of her quarantine regulations impose a tonnage tax on vessels owned in foreign ports.

91. *Ogdensburgh v. Lyon*, 7 *Lans.* (N. Y.) 215, 218, 219.

"It is obvious that the government of the Union, in the exercise of its express power, that, for example, of regulating commerce

with foreign nations and among the states, may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state." Per Marshall, C. J., in *Gibbons v. Ogden*, 9 *Wheat.* (U. S.) 1 *L. Ed.*

92. *People v. Jenkins*, 1 *Hill* (N. Y.) 469.

## CHAPTER 20.

CONSIDERATION OF VALIDITY OF MUNICIPAL ORDINANCES  
AND HEREIN PROCEDURE TO TEST, AND RULES  
OF CONSTRUCTION.

Sec.	Sec.
794. Courts may determine validity of ordinances.	806. Injunction to prevent violation of ordinances.
795. Method of consideration of validity.	807. Certiorari.
796. How the exercise of the police power may be questioned.	808. Same—illustrative cases.
797. Estoppel.	809. Quo warranto.
798. Collateral attack denied.	810. Rules of construction.
799. Enumeration of proceedings in which validity may be questioned.	811. Same subject.
800. Who may question validity.	812. Title in construction.
801. Citizens and taxpayers may question validity of ordinances.	813. Contemporaneous construction.
802. Same—when courts will not interfere at instance of taxpayer or citizen.	814. Construction of penal ordinances.
803. Same subject — illustrative cases.	815. Construction of words and terms.
804. Same—mandamus.	816. Construction where ordinance void in part.
805. Injunction to restrain enforcement.	817. Construction of ordinances—illustrative cases.
	818. Same subject.
	819. Same—who liable—landlord and tenant.
	820. Same subject.

## § 794. Courts may determine validity of ordinances.

The general proposition has been affirmed repeatedly that, questions relative to the necessity and advisability of the enactment of any particular ordinance are, in the first instance, to be determined by the municipal authorities; that the presumption is in favor of its validity, and that courts incline to the judgment and discretion

of the local legislative body.<sup>1</sup> However, the rule is equally well established that the judiciary has the power to determine the validity of the ordinance in any proper case. It may interfere in order to restrain municipal corporations, their officers and agents, from doing illegal acts. The usual legal and equitable remedies may be invoked for this purpose.<sup>2</sup>

1. *People v. Grand Trunk Ry. Co.*, 232 Ill. 292, 83 N. E. 839; *Ex parte Yung*, 7 Cal. App. 440, 94 Pac. 828.

An ordinance is presumptively valid and courts incline to discretion of legislative body. *Chicago & A. Ry. Co. v. Aveill*, 224 Ill. 516, 79 N. E. 654, affirming 127 Ill. App. 275.

See § 730, *ante*.

Judicial interference, §§ 376 to 379, *ante*.

When courts will not interfere with improvement ordinances. *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929.

Where a power touching local improvement is expressly granted to municipal authorities as a general rule, they are in the reasonable exercise of it beyond the control of the courts. *Skinker v. Herman*, 64 Mo. App. 441; *Estes v. Owen*, 90 Mo. 113, 23 S. W. 133; *Farrar v. St. Louis*, 80 Mo. 379; *McCormack v. Patchin*, 53 Mo. 33; *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

Ordinarily courts will not interfere on the ground that a given improvement is unnecessary, and that the ordinance providing for it is, therefore, oppressive and unreasonable. *Marionville to use v. Henson*, 65 Mo. App. 397.

It has been held that the pas-

sage of the ordinance is usually conclusive as to the necessity of the work. *Seibert v. Tiffany*, 8 Mo. App. 33; *Bohle v. Stannard*, 7 Mo. App. 51.

But in *Corrigan v. Gage*, 68 Mo. 541, it was held that an ordinance for a sidewalk in an uninhabited portion of a city, and disconnected with any other street or sidewalk, was unnecessary and oppressive; and such facts might be shown in an action on the special taxbill.

See chapter on public improvements, *post*.

See §§ 371, 372, 726, *ante*, as to mode of execution of power.

Discretionary power in vacating streets, not subject to judicial review. *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102.

2. *Alabama*. *Greensboro v. Ehrenreich*, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130 (second-hand clothing, importing, selling, etc.).

*Illinois*. *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929 (construction of sidewalk by special taxation); *Walker v. Morgan Park*, 175 Ill. 570, 51 N. E. 690; *Peyton v. Morgan Park*, 172 Ill. 102, 49 N. E. 1003; *McChesney v. Chicago*, 171 Ill. 253, 49 N. E. 548; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373; *Endleman v. Bloomington*, 137 Ill. App. 483.



### § 795. Method of consideration of validity.

In determining the validity of any ordinance the question may be considered under three principal heads, namely, *first*, is the subject-matter of the legislation within the powers of the corporation;<sup>3</sup> *second*, is the ordinance in proper form, and was it enacted in the manner prescribed by the organic law of the corporation,<sup>4</sup> and, *third*, if passed by virtue of general or implied power (if such power exists), was such power reasonably exercised.<sup>5</sup> The circumstances under which the motives of the members of the legislative body who

*Louisiana.* Vicksburg, S. & P. R. R. Co. v. Monroe, 48 La. Ann. 1102, 20 So. 664.

*Missouri.* Springfield R. R. Co. v. Springfield, 85 Mo. 674; Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202; St. Louis v. Weber, 44 Mo. 547; Cape Girardeau v. Riley, 72 Mo. 220; St. Louis v. Bell Telephone Co., 96 Mo. 623, 631, 10 S. W. 197.

*Nebraska.* Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 47 Am. St. Rep. 697.

**Validity of an ordinance—determination.** An illegal ordinance is wholly inoperative. It is not made valid by an ordinance continuing in force all existing ordinances until repealed or changed. Omaha v. Harmon, 58 Neb. 339, 78 N. W. 623. Validity of ordinance is question of law. Lebanon v. Zanditon, 75 Kan. 273, 89 Pac. 10.

Power of courts to review ordinances will be exercised with great caution. Clark v. Chicago, 229 Ill. 363, 82 N. E. 370; Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266.

Fraud in obtaining the passage of an ordinance may be shown by any citizen injuriously affected thereby. In re Twenty-first St., 196 Mo. 498, 96 S. W. 201; Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201, 113 Am. St. Rep. 766; In re Oak St., 196 Mo. 515, 96 S. W. 206.

Courts have a right to determine whether ordinances were passed as police regulations or for the purpose of revenue. Wisconsin Teleph. Co. v. Milwaukee, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581.

A contract ordinance granting to a public corporation the right to use city streets is a legislative act with which the court has no power to interfere. Albright v. Fisher, 164 Mo. 56, 64 S. W. 106; State ex rel. v. Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

See §§ 703, 704, 705 *ante*.

3. See ch. 10, § 351 *et seq. ante*, ch. 11, § 391, *et seq. ante*.

4. Chs. 13 and 16 *ante*.

5. Ch. 18, § 724 *et seq. ante*.

voted for the ordinance may be looked into in considering its validity are stated in prior sections.<sup>6</sup>

§ 796. How the exercise of the police power may be questioned.

Specific police powers are often conferred upon municipal corporations but it is not unusual to confer such powers in general terms by way of addition to the particular enumeration appearing in various parts of the charter, or the several legislative acts applicable.

(1) Although the power in question may be conferred by express terms, the objection to its exercise may be raised by showing that the state, in view of its constitution and legislative policy, could not commit to the municipal corporation the execution of such power.<sup>7</sup>

(2) Assuming that it is entirely competent for the state to vest the power in the local corporation, the question whether it has been so vested may be presented, and its determination will depend upon the proper construction of the laws bearing on the subject.<sup>8</sup>

(3) Opposition to the enforcement of any particular local police regulation may also be based on the proposition that it violates the letter or spirit of either the Federal or state constitution in its subject-matter or in the manner of the exercise of the power.<sup>9</sup>

*Specific defenses* to the enforcement of police ordinances are enumerated and considered elsewhere.<sup>10</sup>

6. §§ 703, 704 *ante*.

Motives. The legality of an ordinance will not be tested by the motives or intentions of the individual members of the legislative body. Pottsville Borough v. Pottsville Gas Co., 39 Pa. Super. Ct. 1; Helena v. Miller, 83 Ark. 263, 114 S. W. 237.

The motives of a legislative body for enacting an ordinance may, in case of fraud, be inquired into by the court at the instance

of person injured thereby. People v. Grand Trunk Western Ry. Co., 232 Ill. 292, 83 N. E. 839.

7. Ch. 19, *ante*, constitutionality of municipal ordinances; ch. 25, *post*, municipal police powers and ordinances relating thereto; and ch. 24 *post*, municipal control of offenses against state.

8. Chs. 10 and 11 *ante*.

9. Chs. 18 and 19 *ante*.

10. Ch., *post*, on actions to enforce police ordinances.

## § 797. Estoppel.

The doctrine of estoppel has often been applied when the question of the validity of an ordinance has been raised. Thus a railroad corporation which accepts the benefit of an ordinance, will be estopped from thereafter denying its validity.<sup>11</sup> So one being prosecuted for the violation of a police regulation relating to pawn brokers will not be permitted to question the reasonableness of the regulations therein contained where it appears that he has accepted the provisions of the ordinance.<sup>12</sup>

So the rule of estoppel applies with full force to the municipal corporation itself.<sup>13</sup> Thus where the ordinance is published in pamphlet form by public authority with the other ordinances of the municipality, a city cannot question its validity, on the ground that it was not validly adopted. Its publication estops the city from so doing.<sup>14</sup>

Likewise taxpayers who have petitioned for the enactment of an ordinance levying a special tax are estopped from questioning its validity.<sup>15</sup> However, it has been ruled that, the mere fact that a taxpayer had knowledge of the efforts made by others to secure the passage of an act authorizing an assessment for improvements will not estop him from questioning the validity of the act.<sup>16</sup> So the failure of a property owner to object to street improvements being made with his knowledge under a void ordinance will not estop him from question-

11. *Chicago, etc. R. R. Co. v. Chicago*, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188.

12. *Lauder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625.

13. See ch., *post.* on actions to enforce police ordinances, relating to estoppel as a defense.

14. *People v. Maxon*, 139 Ill. 306, 310, 38 Ill. App. 152, 28 N. E. 1074.

15. *Andrus v. Board of Police*, 41 La. Ann. 697, 6 So. 603, 5 L. R. A. 681; *Dupre v. Board of Police*, 42 La. Ann. 802, 8 So. 593.

16. *Counterman v. Dublin Tp.*, 38 Ohio St. 515.

ing the validity of a special tax bill issued against him therefor.<sup>17</sup>

**§ 798. Collateral attack denied.**

The validity of the ordinance cannot be attacked collaterally. The passage of an ordinance is a legislative act, and public policy forbids that it should be impeached collaterally.<sup>18</sup> Thus in an action by a gas company for gas furnished the corporation by virtue of an ordinance conferring upon the company the perpetual and exclusive right to furnish gas, the validity of the ordinance cannot be questioned.<sup>19</sup>

An ordinance passed which the corporation has no power to enact, as one levying a tax for a purpose not authorized by the charter, is an act of usurpation and all proceedings under it are void; yet where the corporation has power to pass the ordinance for a certain purpose, but exercises that power in an unauthorized manner the ordinance is valid and binding until set aside by legal proceedings instituted for that purpose, and its validity cannot be brought in question collaterally, as a matter of defense to an action under it.<sup>20</sup>

**§ 799. Enumeration of proceedings in which validity may be questioned.**

The particular circumstances and the local practice will determine the nature of the proceedings to test the validity of the ordinance. The following proceedings

17. *Perkinson v. Hoolan*, 182 Mo. 189, 81 S. W. 407.

18. *Consumers' Gas, etc. Co. v. Congress Spring Co.*, 61 Hun (N. Y.) 133, 135 15 N. Y. S. 624.

19. *Decatur Gas Light and Coke Co. v. Decatur*, 120 Ill. 67, 11 N. E. 406, affirming 24 Ill. App. 544.

20. *Camden v. Mulford*, 26 N. J. L. 49, per Green, C. J.

In an action to recover claims arising under an ordinance a copy of such ordinance attached to and filed with the petition as an exhibit is no part of it and hence the validity of the ordinance cannot be determined on a general demurrer to such petition. *Bowling Green v. C. H. & D. R. Co.*, 10 Ohio Cir. Ct. Rep. 63.

have received judicial sanction: (1) Any judicial proceeding, civil or criminal, legal or equitable, wherein the cause of action is founded thereon or the ordinance is directly involved;<sup>21</sup> (2) injunction;<sup>22</sup> (3) prohibition;<sup>23</sup> (4) *mandamus*; <sup>24</sup> (5) *certiorari*; <sup>25</sup> (6) *quo warranto*; <sup>26</sup> (7) *habeas corpus*; <sup>27</sup> (8) proceedings for review, in actions to enforce police ordinances.<sup>28</sup>

### § 800. Who may question validity.

As a rule those not affected, or, whose personal or property rights are in no way involved, cannot question the validity of the ordinance.<sup>29</sup> On the other hand, per-

21. *Com. v. Robertson*, 5 Cush. (Mass.) 438; *St. Charles v. Meyer*, 58 Mo. 86; *Moir v. Munday*, Sayer, 181.

22. § 804 *post*; also chapter, *post*, on actions to enforce police ordinances, subdivision 8.

23. Chapter, *post*, on actions to enforce police ordinances, subdivision 8.

24. *Rex v. Harrison*, 3 Burr. 1322, § 803 *post*.

25. § 806 *post*; also chapter, *post*, on actions to enforce police ordinances, subdivision 8.

26. § 807 *post*.

27. See chapter, *post*, on actions to enforce police ordinances, subdivision 8.

28. Subdivision 8, of chapter, *post*, in actions to enforce police ordinances.

Plea of guilty, held not to be waiver of right to question validity of ordinance on review. *Grossman v. Oakland*, 30 Ore. 478, 60 Am. St. Rep. 832, 41 Pac. 5.

29. *Dram shop license. People ex rel. v. Cregler*, 138 Ill. 401, 28 N. E. 812.

Who may question validity of ordinances illustrated. Forbidding the keeping of liquor for sale—*Certiorari*. *Iske v. Newton*, 54 Iowa 586, 7 N. W. 13.

Taxing insurance agents. *Simrall v. Covington*, 90 Ky. 444, 14 S. W. 369, 29 Am. St. Rep. 398.

Vacating street. *Arnold v. Weiker*, 55 Kan. 510, 40 Pac. 901.

Vacating street. Where petition failed to show complainant was abutting owner. *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102.

Excavations in streets. *State (Rahway Gas Light Co.) v. Rahway*, 58 N. J. L. 510, 34 Atl. 3.

License to lay tracks in streets. *State (Montgomery) v. Trenton*, 36 N. J. L. 79; *State (Kean) v. Bronson*, 35 N. J. L. 468.

Sale of municipal property — Action by taxpayer. *Tift v. Buffalo*, 65 Barb. (N. Y.) 460.

Street franchise—action by taxpayer. *Linden Land Co. v. Milwaukee Elec. R. R. Co.*, 107 Wis. 493, 83 N. W. 851.

sonal and property rights being jealously guarded by the law, cannot be interfered with unreasonably or disturbed injuriously by *ultra vires* or void municipal legislation, and therefore, the law sanctions proper and seasonable legal proceedings to test the validity of ordinances, at the instance of those about to be so affected by their enforcement.<sup>30</sup>

One charged with the violation of an ordinance cannot question the validity of a portion thereof which has not been enforced against him. *Johnson Express Co. v. Chicago*, 136 Ill. App. 368.

An ordinance granting a privilege which is accepted and acted upon becomes a contract, and its validity cannot be questioned by one not a party thereto. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57.

One who has not been refused a license imposed by ordinance cannot complain that the ordinance is void because it grants discretion to municipal authorities to refuse licenses. *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Johnson Express Co. v. Chicago*, 136 Ill. App. 368.

One who is exempt from the payment of a city license on the sale of "near beer" cannot question the reasonableness of the amount of the license. *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815; *Jones v. Waycross*, 6 Ga. App. 212, 64 S. E. 815.

30. When validity of an ordinance may be questioned—illustrations. *Handy v. New Orleans*, 39 La. Ann. 107, 1 So. 593; (Tax-

payers—Wharf lease) *Conery v. New Orleans Waterworks Co.*, 39 La. Ann. 770, 2 So. 555 (Taxpayers—Water contract).

Injunction will lie at suit of one injuriously affected. *Baltimore v. Radecke*, 49 Md. 217, 21 Alb. L. J. 117, 33 Am. Rep. 239; *Page v. Baltimore*, 34 Md. 558, 564; *State (Gregory) v. Jersey City*, 34 N. J. L. 390; *State (N. J. R. R. & T. Co.) v. Jersey City*, 29 N. J. L. 170; *State (Danforth) v. Paterson*, 34 N. J. L. 163; *Camden v. Mulford*, 26 N. J. L. 49; *State v. Jersey City*, 34 N. J. L. 31.

Court will enjoin operation of street railway at instance of private party under a pretended license for franchise which the corporation had no power to grant. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181.

Where large number of persons are affected by void ordinance, its enforcement will be restrained at the instance of any of such persons. *Boyd v. Board of Councilmen*, 117 Ky. 199, 25 Ky. L. Rep. 1311, 77 S. W. 669, 111 Am. St. Rep. 240.

The validity of an ordinance granting to a new sewer company the right to take over the property of the old company and to lay sewer pipes in the streets

As stated elsewhere, in all prosecutions for the violation of police ordinances the defendant may question their validity.<sup>31</sup>

Municipal officers, as trustees of the public interests, may question the legality of ordinances. This is not only a legal right, but it should be viewed as a sacred public duty. They should prevent, if possible, all violations of law on the part of those associated with them in the public service, particularly those of a legislative character which vitally affect the personal and property rights of the entire local community. Such duty is especially incumbent upon the mayor or chief executive officer, who is usually enjoined in express terms by the organic law to see that all legal provisions are duly observed. Accordingly, it has been held in Pennsylvania that the chief burgess of a municipal borough may question the validity of an ordinance by proper legal proceedings, notwithstanding he vetoed it.<sup>32</sup>

and charge a higher rental than the old company, may be questioned on *certiorari* at the instance of a property owner who used and paid rent for the sewer. *Fogg v. Ocean City*, 74 N. J. L. 362, 65 Atl. 885.

**Abutting owner.** A railroad company as an abutting lot owner may enjoin the unauthorized construction of a railroad upon streets by another company where special injury will result to complainant from the construction and operation of the proposed road. The fact that the complainant road is occupying streets under a void franchise does not estop it as an abutting owner from enjoining the other company from constructing and operating tracks under a void grant. *Louisville & N. R. Co. v. Mobile, etc. R. Co.*, 124 Ala. 162, 26 So. 895.

Rival telephone company cannot maintain action where it fails to show unreasonable interference with its business. *Louisville Home Tel. Co. v. Cumberland Tel. Co.* (U. S. C. C. A.), 111 Fed. 663.

Franchise ordinance which has been accepted and acted upon becomes a contract, and ordinarily its validity cannot be attacked by third persons. *Chicago Telephone Co. v. North Western Telephone Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57.

31. Chapter, *post*, on actions to enforce police ordinances, subdivision 6.

32. When mayor should question the validity of an ordinance. Respecting the right of the chief burgess to question the validity of the ordinance, the court remarked, that "this is hardly de-

# § 801. Citizens and taxpayers may question validity of ordinances.

The law has been declared that a suit by injunction may be instituted by any taxpayer for himself and all others similarly situated to enjoin the collection of an illegal tax or the enforcement of an illegal ordinance where the effect would be to impose upon him an unlawful tax or to increase his burden of taxation.<sup>33</sup> So where

batable. The statute confers on him the veto power. \* \* \* He has a right to assert his prerogative, and he can do this only by denying the validity of the ordinance alleged to be binding notwithstanding his veto. The appropriate remedy for him is by bill in equity to restrain action under the ordinance alleged on one side to be legal and on the other to be without legal force. This brings his prerogative and the manner of its exercise before the court and determines the duty of the council towards him." *Le-high Coal and Navigation Co. v. Inter-County Street Railway*, 167 Pa. St. 126, 136, 36 Wkly. Notes of Cases (Pa.) 160, 31 Atl. 477.

It is the duty of the mayor to question the validity of an ordinance which he deems invalid. *Capdevielle v. New Orleans*, S. F. R. Co., 110 La. 904, 34 So. 868.

33. *St. Louis v. Wenneker*, 145 Mo. 230, 47 S. W. 105; *Arnold v. Hawkins*, 95 Mo. 569, 8 S. W. 718; *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429; *Valle v. Ziegler*, 84 Mo. 214; *Newmeyer v. Mo. & Miss. R. R. Co.*, 52 Mo. 81; *Ranney v. Bader*, 67 Mo. 476.

Taxpayer may enjoin action under void ordinance. *Sank v.*

*Philadelphia*, 4 Brews. (Pa.) 133.

Fact complainant voted for the ordinance on its final passage does not estop him from asserting its invalidity. *Stadler v. Fahey*, 87 Ill. App. 411, 414.

*Contra.* Where interest of taxpayer differs only in degree from that of other residents and whose property does not abut on the park he cannot sue to enjoin its condemnation for a railroad station. *Manson v. South Bound R. Co.*, 64 S. C. 120, 41 S. E. 832.

Injunction at instance of taxpayers denied, to restrain building city hall. *Parker v. Concord*, 71 N. H. 468, 52 Atl. 1095.

Although act may be *ultra vires* injunction will not lie at instance of taxpayers where it does not appear that the execution of the act will injuriously affect such complainants. *Blanton v. Merry*, 116 Ga. 288, 42 S. E. 211.

Injunction by taxpayers to prevent bond issue denied. *Le Tourneau v. Duluth*, 85 Minn. 219, 88 N. W. 529.

State statutes give remedy against illegal official and corporate acts. *Osterhoudt v. Rigney*, 98 N. Y. 222; *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12,



a public right is involved and the object of the suit is to enforce a public duty or keep public officials within the limits of their legal powers the people are regarded as the real party; and in such case the relator, in a suit for a writ of *mandamus* and by analogy, the plaintiff in a suit for injunction, need not show any legal or special interest in the result.<sup>34</sup> The doctrine thus broadly stated is denied by some cases.<sup>35</sup>

It has been held that a resident and taxpayer has such an interest as to entitle him to an injunction to prevent the incurring of indebtedness in excess of that allowed by law.<sup>36</sup> So where a city is attempting to dispose of public property without warrant of law a non-resident of the city who has property liable to taxation may maintain an injunction to enjoin such disposition.<sup>37</sup> So, injunction will lie at the suit of a taxpayer to enjoin the

34. *Massachusetts*. Sinclair v. Brightman, 198 Mass. 248, 84 N. E. 453.

*Missouri*. State ex rel. v. School Board, 131 Mo. 505, 33 S. W. 3; Ranney v. Bader, 67 Mo. 476; Overall v. Ruenzi, 67 Mo. 203; Rubey v. Shain, 54 Mo. 207; Newmeyer v. Mo. Pac. R. Co., 52 Mo. 81; Knapp v. Kansas City, 48 Mo. App. 485.

*Nebraska*. Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128, rehearing 67 Neb. 388, 93 N. W. 747.

*New York*. Greene v. Knox, 175 N. Y. 432, 67 N. E. 910.

*Wisconsin*. Kircher v. Peder-son, 117 Wis. 68, 93 N. W. 813.

35. See cases *supra* in this section and in the section which follows. O'Brien v. Louer, 158 Ind. 211, 61 N. E. 1004; Davidson v. Baltimore, 96 Md. 509, 53 Atl. 1121; Wilkins v. Chicago, etc. R. Co., 110 Tenn. 422, 76 S. W. 1026.

36. Wright v. Bishop, 88 Ill. 302; Springfield v. Edwards, 84 Ill. 626.

37. Brockman v. Creston, 79 Iowa 587, 44 N. W. 822.

Injunction granted to prevent unauthorized appropriation of corporate funds. Stevens v. St. Mary's Training School, 144 Ill. 336, 36 Am. St. Rep. 438, 32 N. E. 962.

entering into,<sup>38</sup> or the consummation,<sup>39</sup> or the enforcement, of an illegal or unauthorized contract.<sup>40</sup> Thus where the contract is illegal in that it confers a monopoly, equity may be invoked if the carrying out of the contract would increase the burden of taxation.<sup>41</sup> So, injunction on behalf of the property owner on the street to be improved will lie to enjoin the doing of the work under a contract not let to the lowest bidder where the charter so requires.<sup>42</sup>

And it is generally held that injunction will lie on behalf of the public brought by a taxpayer to restrain the performance of any invalid contract for public work as where the bidding was restricted so as to exclude nonunion labor and thus increased the cost of the work.<sup>43</sup>

**§ 802. Same—when courts will not interfere at instance of taxpayer or citizen.**

It should be borne in mind that the doctrine just stated and illustrated is not based on the right of the property owner or taxpayer, resident or non-resident, or citizen, to dictate and control the administration of

38. *Reighard v. Flinn*, 189 Pa. St. 355, 42 Atl. 23, and authorities cited in brief of appellees at page 359 of state report.

Execution of contract relating to water supply, held to be a ministerial act. *Valparaiso v. Gardner*, 97 Ind. 1, 3, 49 Am. Rep. 416.

Injunction by taxpayer to enforce contract to light street. *Schiffman v. St. Paul*, 88 Minn. 43, 92 N. W. 503.

Taxpayer may enjoin the city from entering into an illegal contract involving the expenditure of municipal funds. *Austin v. McCall*, 95 Tex. 565, 68 S. W. 791.

39. *Yarnell v. Los Angeles*, 87 Cal. 603, 25 Pac. 767.

40. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Parkerson v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238.

41. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.

42. *Mazet v. Pittsburg*, 137 Pa. 548, 20 Atl. 693, 27 Weekly Notes Cas. 73.

43. *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

See chapter on public improvements, ordinances restricting competition.

the municipal government and to nullify by proceedings in the courts the lawful acts of the public officials, legislative or executive, done in the administration of the municipal affairs, because it may be assumed that the proposed acts of the corporate authorities sought to be restrained do not promote the best interests of the community and are, therefore, against public policy.

As to the taxpayer, the doctrine rests upon the ground of direct interference with his rights, for the reason that if the proposed unauthorized act were consummated his burden of taxation might or would probably be increased.

As to the citizen, the ground of relief is found in the fact that the public have a right to be protected against unauthorized or illegal acts on the part of the municipal authorities where such contemplated acts do not involve merely discretionary matters or questions of mere expediency or policy, but where they are in fact in contravention of express or implied constitutional, statutory, charter or ordinance provisions. Thus, whether a city being only authorized to purchase such lands as might be necessary for the purpose of the corporation, could take lands outside of her limits not necessary for such purposes, "is a question that can only arise in a proceeding instituted by the state against the city for abusing her right to purchase lands."<sup>44</sup>

### § 803. Same subject—illustrative cases.

According to the doctrine stated in the preceding section, a mere citizen and taxpayer is without standing to challenge the acts of the municipality unless he can show a special interest growing out of the likelihood of his tax being increased.<sup>45</sup> So the fact that an ordinance violates vested rights of a gas company does not give a taxpayer the right to test its validity.<sup>46</sup>

44. *Chambers v. St. Louis*, 29 Mo. 543, 576.

45. *State ex rel. Saunders v. Kohnke*, 109 La. 838, 33 So. 793.

46. *Morris v. Municipal Gas Co.*, 121 La. 1016, 46 So. 1001.

In one case there existed a contract between a city and a water company, by which the latter agreed to furnish water and to maintain sufficient pressure in the mains for fire purposes. Here the property owner based his suit on the ground that if a proper pressure had been maintained his property would not have been destroyed and the fire could have been extinguished. The court held that he had no right to maintain the suit, as there was no privity of contract between the company and the plaintiff.<sup>47</sup>

Agreeably to the doctrine stated, a taxpayer has no interest in the question as to whether or not an election in the county should be held by means of voting machines so as to entitle him to an injunction to control the method of conducting the election.<sup>48</sup> Likewise under ordinances providing that the compensation of a counselor employed to assist the city solicitor shall be paid by such solicitor out of his salary, a taxpayer is not entitled to question by *certiorari* the validity of the resolution of the council employing a counselor for that purpose.<sup>49</sup>

In a Missouri case the proper municipal authorities granted to a railway company the right of way over certain streets, on condition that the road should be completed within twelve months from the acceptance of the grant by the company, and that in case of failure so to complete it, the council might take away the franchise. Here it was held that this provision was a condition subsequent, and that the right of way, when accepted by the company, vested at once, subject to be defeated at the election of the city for breach of the condition, but that a private citizen could not take advantage of a breach.<sup>50</sup>

47. Boston S. D. & T. Co. v. Salem Water Co., 94 Fed. 238.

48. United States Standard Voting Machine Co. v. Hobson, 132 Iowa 38, 109 N. W. 458, 7 L. R. A. (N. S.) 512.

49. Cole v. Atlantic City, 69 N. J. L. 131, 54 Atl. 226.

50. Hovelman v. Kansas City, Horse R. Co., 79 Mo. 632, 639.

## § 804. Same—mandamus.

It is settled law in Missouri that where the performance of a public duty obviously affects the rights of all citizens, any of them may move for a *mandamus* to compel the performance of that duty, and "citizens, taxpayers and resident householders" have sufficient interest to maintain such action.<sup>51</sup> Where a public right is involved and the object is to enforce a public duty, the people are regarded as the moving party; and in such case, the relator in *mandamus* need not show any special interest in the result, if the performance of the general duty obviously affects his right as a citizen.<sup>52</sup>

51. *State ex rel. v. St. Louis School Board*, 131 Mo. 505, 33 S. W. 3; *State ex rel. v. Public Schools*, 134 Mo. 296, 35 S. W. 617; *State ex rel. v. H. & St. J. Ry. Co.*, 86 Mo. 13; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1; *State ex rel. v. Crete*, 32 Neb. 568, 49 N. W. 272.

52. *Colorado. Rizer v. People*, 18 Colo. App. 40, 69 Pac. 315.

*Illinois. People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; *People v. Suburban R. Co.*, 178 Ill. 594, 49 L. R. A. 650, 53 N. E. 349.

*Missouri. State ex rel. v. School Board*, 131 Mo. 505, 33 S. W. 3.

*Montana. Chumasero v. Potts*, 2 Mont. 242.

*Michigan. Berube v. Wheeler*, 128 Mich. 32, 87 N. W. 50; *Elliot v. Detroit*, 121 Mich. 611, 84 N. W. 820; *Brophy v. Schindler*, 126 Mich. 341, 85 N. W. 1114.

*Nebraska. State v. Shropshire*, 4 Neb. 411; *State v. Stearns*, 11 Neb. 104, 7 N. W. 743; *State v. Kearney*, 25 Neb. 262, 41 N. W. 175; *Cooperrider v. State*, 46 Neb. 84, 64 N. W. 372.

*Nevada. State v. Gracey*, 11 Nev. 223.

*New York. People v. Keating*, 168 N. Y. 390, 61 N. E. 637, reversing 71 N. Y. S. 97; *People v. Swanstrom*, 79 N. Y. S. 934, 79 App. Div. 94; *People v. Northern Cent. R. Co.*, 164 N. Y. 289, 58 N. E. 138.

*Ohio. State v. Nash*, 66 Ohio St. 612, 64 N. E. 558; *State v. Fayette County*, 22 Ohio Cir. Ct. 433, 12 Ohio Cir. Dec. 316.

*South Dakota. State v. Menzie*, 17 S. D. 535, 97 N. W. 745; *State v. Lien*, 9 S. D. 297.

*Washington. State v. Mason*, 45 Wash. 234, 88 Pac. 126; *State v. Yakey*, 43 Wash. 15, 85 Pac. 990.

*West Virginia. Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

*Wisconsin. State v. Cornwall*, 97 Wis. 565, 73 N. W. 63.

**Action by taxpayer, when.** "The rule is, where it is sought to compel the performance of a ministerial duty by a public officer, any citizen interested in the execution of the laws may be the informer." *State v. Osborn*, 60 Neb. 415, 417, 83 N. W. 357, 359.

While in matters in which public officers exercise a discretion, *mandamus* will lie to compel them to act, yet it will not dictate the terms of said discretion.<sup>53</sup> Thus *mandamus* will lie to compel the board of police commissioners of the City of St. Louis to vacate an order made by it directing the chief of police of the city not to interfere with the sale of wine or beer on Sunday.<sup>54</sup> So, *mandamus* is an appropriate remedy to compel the restoration of a highway to its former condition, and in this respect, to require the corporation to perform its charter duties.<sup>55</sup> The question here is one of public right, and the better opinion is that it is sufficient for the relators in such cases to show that they are citizens, and thus interested in the performance of a public duty.<sup>56</sup>

The extraordinary writ of *mandamus* may be invoked either for the purpose of enforcing or protecting a private right, unconnected with the public interest, or for merely a public right, where the people at large are the real parties. When addressed to a ministerial officer it simply commands him to perform some specific act, the performance of which is required of him by law. *State ex rel. v. Tracy*, 94 Mo. 217, 220, 6 S. W. 709.

53. *Alabama*. *State v. Hamil*, 97 Ala. 107, 11 So. 892.

*California*. *Walker v. San Francisco*, 139 Cal. 108, 72 Pac. 829.

*Connecticut*. *State v. Bridge Commissioners*, 63 Conn. 91, 26 Atl. 580.

*Florida*. *Towls v. State*, 3 Fla. 202.

*Illinois*. *McGann v. Harris*, 114 Ill. App. 308.

*Indiana*. *State v. Tippecanoe County*, 131 Ind. 90, 30 N. E. 892.

*Iowa*. *Scripture v. Burns*, 59 Iowa 70, 12 N. W. 760.

*Kentucky*. *Young v. Beckham*, 115 Ky. 246, 72 S. W. 1092, 24 Ky. L. Rep. 2135.

*Louisiana*. *State v. Board of Commissioners*, 115 La. 684, 39 So. 842.

*Maine*. *Bangor v. Penobscot County*, 87 Me. 294, 32 Atl. 903.

*Michigan*. *Hicks v. Trustees*, 151 Mich. 88, 114 N. W. 682.

*Missouri*. *State v. Jones*, 155 Mo. 570, 56 S. W. 307; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1.

*Virginia*. *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529.

*Washington*. But see *State v. Clausen*, 44 Wash. 437, 87 Pac. 498.

*West Virginia*. *Taylor County Court v. Holt* (W. Va., 1906), 56 S. E. 205.

54. *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1.

55. *State ex rel. v. Hannibal & St. J. Ry. Co.*, 86 Mo. 13.

56. *State ex rel. v. Hannibal & St. J. Ry. Co.*, 86 Mo. 13.

And a private citizen is a competent party to a *mandamus* proceeding to compel public officers to enforce a city ordinance.<sup>57</sup> So, *mandamus* may be invoked to test the validity of an ordinance appropriating money out of the general revenue where such appropriation is contended to be a diversion of the money of the taxpayers in contravention of charter provisions.<sup>58</sup> So, *mandamus* is properly brought in the name of the state, on the relation of taxpayers residing in a school district, wherein an election of a school director is to be held, to compel the board and its members constituting the election committee to rescind certain appointments of judges and clerks, made by such committee for the election of a member of the board.<sup>59</sup> So, *mandamus* will lie at the suit of one having no special interest to compel the mayor to revoke an illegal permit.<sup>60</sup> And the writ may be invoked to compel the board of engineers of St. Louis to grant an engineer's license where the same is withheld because of caprice or whim.<sup>61</sup>

It has been held in Nebraska, that a private individual, not shown to be either a citizen or to be beneficially interested in the enforcement of the laws, cannot invoke *mandamus* to compel an officer to perform a public duty.<sup>62</sup> So it has been ruled in South Carolina that a citizen of a city who is not a taxpayer is not entitled to *mandamus* to compel another citizen to pay city taxes.<sup>63</sup>

57. *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1.

58. *Hitchcock v. St. Louis*, 49 Mo. 484.

59. *State ex rel. v. Public Schools*, 134 Mo. 296, 35 S. W. 617.

Where officials arbitrarily refuse to audit claims, etc., *mandamus* will lie. *People v. Board of Supervisors, etc.*, 45 N. Y. 196, 199; *People v. Board of Supervisors*, 73 N. Y. 173.

60. *State ex rel. v. Noonan*, 59

Mo. App. 524; see *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1.

61. *St. Louis v. Meyrose Lamp Co.*, 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474.

*Mandamus* denied as proper remedy to test validity of ordinance. *Com. v. Fittler*, 136 Pa. St. 129, 20 Atl. 424.

62. *State v. Osborn*, 60 Neb. 415, 83 N. W. 357.

63. *Garrison v. Laurens*, 55 S. C. 551, 33 S. E. 577.

The statutes of some states provide that any person "beneficially interested" in the performance of a public duty is entitled to the writ to compel performance.<sup>64</sup>

*Mandamus* is the proper remedy to compel the city to construct a street within a reasonable time after it has been laid out.<sup>65</sup>

One whose land has been taken for street opening purposes is entitled to *mandamus* to compel the city to open the entire street and acquire all rights necessary for such purpose.<sup>66</sup>

### § 805. Injunction to restrain enforcement.

The remedy by writ of injunction or prohibition (as termed by some statutes)<sup>67</sup> usually exists in all cases where an irreparable injury to real or personal property is threatened and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded at law, and, according to some statutes, by an action for damages.<sup>68</sup>

64. *Fritts v. Charles*, 145 Cal. 512, 78 Pac. 1057; *Ellis v. Workman*, 144 Cal. 113, 77 Pac. 822; *Van Horn v. State*, 51 Neb. 232, 70 N. W. 941; *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135; *Clough v. Curtis*, 134 U. S. 361 (Idaho), 10 Sup. Ct. 573, 33 L. Ed. 945.

65. *Aspinwall v. Boston*, 191 Mass. 441, 78 N. E. 103; *McCarthy v. Boston St. Commissioners*, 188 Mass. 338, 74 N. E. 659.

66. *Barnert v. Patterson*, 69 N. J. L. 122, 54 Atl. 227.

67. The term prohibition is used in the general sense of restraint by injunction and not in the technical sense of a writ of prohibition. *Casby v. Thompson*, 42 Mo. 133.

68. *R. S. Mo.* 1909, § 2534; *Princess Amusement Co. v. Metzger*, 169 Ind. 376, 82 N. E. 758,

citing *McQuillin*, *Mun. Ords.*, § 285.

**Injunction defined.** A writ of injunction may be defined to be a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. In its broadest sense the process is restorative as well as preventive, and may issue both in the enforcement of rights and in the prevention of wrongs. *High on Injunctions*, § 1.

*Mr. Justice Story* describes it as "a judicial process whereby a party is required to do a particular thing, or refrain from doing a particular thing, according to the exigency of the writ." 2 *Story* Eq. Jur., § 861; 3 *Daniel's Ch. Pr.* 1809, *et seq.*

See 2 *McQuillin*, *Missouri Practice*, § 1698 *et seq.*



This remedy has often been applied to restrain the enforcement of void ordinances where it appeared that their enforcement was threatened and which would result in irreparable injury to the property of the complainant and there was no other adequate remedy open to him. The cases in the notes fully illustrate the doctrine.<sup>69</sup>

69. *Georgia*. Athens v. Georgia R. R. Co., 72 Ga. 800; Gould v. Atlanta, 55 Ga. 678.

*Indiana*. Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; Spiegel v. Gansburg, 44 Ind. 418.

*Maryland*. Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541, 30 Atl. 648, 45 Am. St. Rep. 339; Baltimore v. Scharf, 54 Md. 499; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239.

*Missouri*. Dennison v. Kansas City, 95 Mo. 416, 8 S. W. 429.

*New York*. People v. New York, 32 Barb. (N. Y.) 35, 10 Abb. Pr. (N. Y.) 144, 19 How. Pr. (N. Y.) 155; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Wood v. Brooklyn, 14 Barb. (N. Y.) 425.

*Pennsylvania*. Appeal of Harper, 109 Pa. St. 9, 1 Atl. 791; Sank v. Philadelphia, 4 Brews. (Pa.) 133, 8 Phila. (Pa.) 117.

*United States*. Barthet v. New Orleans, 24 Fed. 563.

*Canada*. Hamilton Distillery Co. v. Hamilton, 38 Can. S. Ct. 239, 12 Ont. L. R. 75, 7 Ont. W. R. 655.

**Injunction to restrain enforcement of ordinances**—illustrative cases. To prevent invasion of right of property. Guillotte's Heirs v. New Orleans, 12 La. Ann.

479; Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 252.

To protect vested right. Cape May & S. L. R. Co. v. Cape May, 35 N. J. Eq. 419; Platte & D. Canal & M. Co. v. Lee, 2 Colo. App. 184, 29 Pac. 1036.

Forbidding burial of dead in designated cemetery—property rights. Austin v. Austin City Cem. Assn., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

Fire limits—destruction of buildings. Montgomery v. Louisville & N. R. Co., 84 Ala. 127, 4 So. 626; Hine v. New Haven, 40 Conn. 478.

License fee ordinance, enforcement enjoined. Southern Express Co. v. Ensley, 116 Fed. 756.

Injunction to restrain enforcement of ordinance to levy tax on bicycles will lie, where city has no power to pass such ordinance. Chicago v. Collins, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 507, 29 Chicago Leg. N. 426.

An illegal ordinance imposing a license tax will be enjoined on a showing that the license is illegal and that on enforcement complainant would be compelled to defend a multitude of criminal prosecutions and would suffer irreparable injury in his business. Hutchinson v. Beckman (U. S. C. C. A.), 118 Fed. 399.

The general doctrine is that courts of equity never interfere to stay proceedings of a criminal character, as such courts deal only with civil and property rights. This rule has been applied to proceedings under ordinances enforceable by fine, with consequent liability to imprisonment, where there appeared to be no invasion of property rights.<sup>70</sup> But equity will restrain unauthorized invasions of property rights which threaten irreparable injury, even though the threatened acts are

Ordinance interfering with street railroad franchise and property. *Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

Impairing obligation of contracts. *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385.

Void ordinance—reducing water rates. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

Ordinance fixing water rates at unreasonable amounts in violation of the state constitution. *Spring Valley W. W. v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. 910, 1046.

Ordinance illegal; forbidding hauling on certain streets. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155.

In Kentucky the validity of ordinances of cities of the first class may be tested by writ of prohibition. *Bybee v. Smith*, 22 Ky. L. Rep. 467, 1684, 57 S. W. 789.

Enforcement of ordinance restrained in the following case: Void ordinance directing removal of buildings. *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259, 43 So. 706, 10 L. R. A. (N. S.) 310.

Unreasonable ordinance limiting speed of street cars to six miles an hour to the injury of the public service and the property rights of the street car company. *United Traction Co. v. Watervliet*, 71 N. Y. S. 977, 35 Misc. Rep. 392.

Ordinance prohibiting erection or operation of baseball park on specified streets, under penalty of a fine. *New Orleans Baseball & A. Co. v. New Orleans*, 118 La. 228, 42 So. 784, 7 L. R. A. (N. S.) 1014.

70. Injunction denied to restrain the execution of an ordinance of a criminal nature, on the ground of the invalidity of the ordinance or that the complainant is exempted from its operation. *Moultrie v. Patterson*, 109 Ga. 370, 34 S. E. 600; *Garrison v. Atlanta*, 68 Ga. 64; *Phillips v. Stone Mountain*, 61 Ga. 386.

Court will not enjoin if property rights are not invaded. *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

Rule applied to criminal statute. *Gault v. Wallis*, 53 Ga. 675, 677.

punishable as crimes.<sup>71</sup> And it has been declared in Missouri that the doctrine that criminal statutes cannot be tested or their enforcement restrained in civil courts has no application to municipal ordinances, which, while penal, are not criminal statutes.<sup>72</sup> Thus the enforcement of a city ordinance making it a misdemeanor to buy or sell certain articles, unless in a manner therein provided, will be enjoined if such ordinance is invalid, although its invalidity has not been determined in a prosecution thereunder or in an action of a legal character.<sup>73</sup>

Where the ordinance is void the remedy by injunction has frequently been sustained in order to prevent a multiplicity of prosecutions under it.<sup>74</sup>

71. *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106; *Joseph Schlitz Brewing Co. v. Superior*, 117 Wis. 297, 93 N. W. 1120; *Hutchinson v. Beckham*, 118 Fed. 399, 55 C. C. A. 333; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *McFarlain v. Jennings*, 106 La. 541, 31 So. 62.

"Where penal ordinances injuriously affect existing property rights their legality and constitutionality may be inquired into by a court of equity and their execution in a proper case enjoined." *New Orleans Baseball & A. Co. v. New Orleans*, 118 La. 228, 234, 42 So. 784, 7 L. R. A. (N. S.) 1014.

Injunction to test validity of statute. *Business Men's League v. Waddill*, 143 Mo. 495, 45 S. W. 262; *State ex rel. v. Hughes*, 104 Mo. 459, 16 S. W. 489.

72. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; *Kansas City v. Clark*, 68 Mo. 583.

73. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566.

Boycott and strike cases arising under particular facts. *Marx & Haas Jeans C. Co. v. Watson*, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; *August Gast B. N. & L. Co. v. Fenimore Assn.*, 79 Mo. App. 612; *Swaine v. Blackmore*, 75 Mo. App. 74.

*Contra*. Invalidity must be established in court of law. *Forcheimer v. Mobile*, 84 Ala. 126, 4 So. 112; *Marvin Safe Co. v. New York*, 38 Hun (N. Y.) 146.

Equity has no jurisdiction. *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115.

74. *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907; *South Covington & C. St. Ry. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161; *Brown v. Catlettsburg*, 11 Bush (74 Ky.) 435; *Newport v. Bridge Co.*, 90 Ky. 193, 13 S. W. 720; *Holland v. Baltimore*, 11 Md. 186.

The rule is uniformly sustained that if an adequate remedy at law exists (according to some statutes by an action for damages), or where no irreparable injury to property rights are threatened, injunction will be denied to restrain the enforcement of the ordinance.<sup>75</sup>

**Contra.** *West v. New York*, 10 Paige (N. Y.) 539.

To avoid a multiplicity of suits and have the controversy settled at one hearing, followers of a particular occupation, as master plumbers, whose rights and liabilities are identical, may join in a suit in equity to restrain the enforcement of an alleged illegal ordinance requiring a license to be obtained, where it appears that the corporate authorities are threatening each of them with prosecution for non-compliance, and each prosecution would involve the same right claimed. *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004, reversing 88 Ill. App. 315.

Federal courts have jurisdiction where the loss alleged exceeds \$2,000 and the sum involved for jurisdictional purposes is not alone the tax demanded (here an illegal license tax) but the value of complainant's right to conduct his business without being subject to the illegal tax. *Hutchinson v. Beckman* (C. C. A.), 118 Fed. 399.

75. Adequate remedy at law.

*Alabama.* *Forcheimer v. Mobile*, 84 Ala. 126, 4 So. 112.

*Colorado.* *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624.

*Connecticut.* *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354.

*Georgia.* *Moultrie v. Patterson*, 109 Ga. 370, 34 S. E. 600; *Pope v. Savannah*, 74 Ga. 365.

*Illinois.* *Poyer v. Des Plaines*, 123 Ill. 111; 13 N. E. 819, 5 Am. St. Rep. 494, 20 Ill. App. 30; *Yates v. Batavia*, 79 Ill. 500; *Skakel v. Roche*, 27 Ill. App. 423; *Kline-smith v. Harrison*, 18 Ill. App. 467.

*North Carolina.* *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64; *Warden of St. Peter's E. Ch. v. Washington*, 109 N. C. 21, 13 S. E. 700; *Cohen v. Goldsboro*, 77 N. C. 2.

*Texas.* *Wade v. Nunnally*, 19 Tex. Civ. App. 256, 46 S. W. 668.

*United States.* *Torpedo Co. v. Clarendon*, 19 Fed. 231.

As where right of appeal exists. *Levy v. Shreveport*, 27 La. Ann. 620; *Browne v. New Orleans*, 38 La. Ann. 517.

**Various illustrations.** Abuse of discretion by municipal authorities is not sufficient ground, when. *Rosenbaum v. Newbern*, 118 N. C. 83, 32 L. R. A. 123, 24 S. E. 1.

Where the authorities are acting within their powers, and no fraud is imputed or shown, no invasion of private rights, no manifest oppression and no gross abuse, their actions are not subject to judicial control. *Brennan v. Sewerage & Water Board of New Orleans*, 108 La. 569, 32 So. 563.

**§ 806. Injunction to prevent violation of ordinances.**

Ordinarily, injunction will not lie to prevent threat-

Ordinance for local improvement. Injunction denied. Sought on ground that ordinance was unreasonable, oppressive and unjust. It appeared that there was an adequate remedy at law by objection on application to confirm the special tax levied to pay for the improvement. *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929.

Injunction denied to prevent the letting of contract, there being no irreparable injury shown or threatened. *Barto v. San Francisco*, 135 Cal. 494, 67 Pac. 758; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

Forbidding erection of wooden building in fire limits. *Hine v. New Haven*, 40 Conn. 478.

Franchise ordinance. *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518.

To stop issue of bonds. *Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861; *Ottumwa v. City Water Supply Co. (C. C. A.)*, 119 Fed. 315.

Ordinance as to wharfage. Ordinance prescribing certain rates of wharfage on vessels "that may discharge or receive freight, or land on, or anchor at, or in front of, any public landing or wharf belonging to the city, for the purpose of discharging or receiving freight." Here it was contended by a transportation company engaged in interstate commerce that the wharfage was extortionate and was merely a pretext for levying

a duty of tonnage. An injunction suit was brought in the federal court praying that the prosecution of a suit brought in the state court to collect the wharfage be enjoined and that the ordinance be declared void. Held, that the character of the charges must be determined by the ordinance itself and as it on its face imposed them for the use of the wharf only, and not for entering the port or lying at anchor in the river, the court will refuse injunction. *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584.

Dairy ordinance. *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575.

Defective title of ordinance no ground. *Barton v. Pittsburg*, 4 Brewst. (Pa.) 373.

Fact ordinance is not enforced against other violators is no ground for injunction. *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

Denied where ordinance is not wholly void. *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726.

Laches. *Parker v. Concord*, 71 N. H. 468, 52 Atl. 1095.

In an action to enjoin prosecution for the violation of an ordinance to test the validity of an ordinance, the question whether the acts charged in the warrants constitute a violation of the ordinance, cannot be considered. *Chesapeake & O. Ry. Co. v. Maysville*, 24 Ky. L. Rep. 614, 69 S. W. 728.

ened violation of an ordinance.<sup>76</sup> The usual remedy is by action to recover the penalties imposed.<sup>77</sup> However, injunction proceedings have been sustained where the violation would constitute a public nuisance and result in special and irreparable damage to the complainant, as, for example, by the erection or removal of a wooden building to a place within the fire limits where it is to be located dangerously near complainant's premises.<sup>78</sup>

### § 807. *Certiorari*.

In New Jersey, *certiorari* will lie to test the validity of the ordinance.<sup>79</sup> Where the local corporation has no

76. *Illinois*. *Finegan v. Allen*, 46 Ill. App. 553.

*Michigan*. *St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671.

*New Hampshire*. *Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700.

*New York*. *New Rochelle v. Lang*, 75 Hun (N. Y.) 608, 27 N. Y. S. 600; *Hudson v. Thorne*, 7 Paige (N. Y.) 261.

*Texas*. *Greiner Kelly Drug Co. v. Truett*, 97 Tex. 377, 79 S. W. 4; *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005.

*Wisconsin*. *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446.

77. See chapter, *post*, on actions to enforce police ordinances.

78. *Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733, 10 L. R. A. (N. S.) 580; *Chimine v. Baker*, 8 Tex. Ct. Rep. 10, 75 S. W. 330.

Sustained at instance of property owner to enjoin removal of a wooden building to a place within fire limits in violation of an ordinance where it is to be located dangerously near plaintiff's frame house. *Kaufman v. Stein*, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333.

So injunction was sustained to prevent erection of wooden building in violation of ordinance within fire limits by property owner on a showing that the erection would work special and irreparable injury to him and his property. *First Nat. Bk. v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434.

Depreciation in value of land held not to be such special damage as would sustain injunction. *McCloskey v. Kreling*, 76 Cal. 511, 18 Pac. 433.

Posting bills without permit, in violation of ordinance will not be restrained by injunction where it is not alleged that the business is a nuisance. *Mt. Vernon v. Seeley*, 77 N. Y. S. 250, 74 App. Div. 50.

79. *Camden v. Mulford*, 26 N. J. L. 49; *State (Leland) v. Long Branch Comrs.*, 42 N. J. L. 375.

Delay in bringing—effect. *State (Doyle) v. Newark*, 30 N. J. L. 303, 306.

Irregularly adopted, will not be set aside, when. *State (Vanatta) v. Morristown*, 34 N. J. L. 445.

power to enact the ordinance it will be annulled by *certiorari* instituted by a person who may be affected by the enforcement of such ordinance, notwithstanding no attempt has been made to enforce it.<sup>80</sup> Thus where an ordinance granting a franchise to lay railroad tracks in the streets is passed without previous notice to persons interested and where one of the members of the board of public works who votes for it is interested as a stockholder in the road, the ordinance may be annulled by *certiorari*.<sup>81</sup>

The owners of the fee simple of land in a street may prosecute a *certiorari* to test the validity of a municipal ordinance purporting to authorize a railway company to place rails, poles and wires on their lands in the street.<sup>82</sup> So an owner of lands abutting a street, who is also a taxpayer is entitled to *certiorari* to set aside an *ultra vires* ordinance which undertakes to authorize a railroad company to occupy such street longitudinally.<sup>83</sup> So an abutting owner can maintain *certiorari* to review an ordinance changing the grade of a street in front of his property.<sup>84</sup> In New Jersey, the general rule has been stated that "the supreme court will intervene by *certiorari* at the instance of a property owner, where the municipality attempts unlawfully to encroach upon his fee in the highway in front of his abutting lands, because he suffers a special injury."<sup>85</sup>

80. New Jersey R. & Transp. Co. v. Jersey City, 29 N. J. L. 170.

81. State (West Jersey Traction Co.) v. Board of Public Works, 56 N. J. L. 431, 29 Atl. 163.

82. State (Kennelly) v. Jersey City, 57 N. J. L. 293, 298, 30 Atl. 531, 26 L. R. A. 281; Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895.

83. Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895; Thompson v. Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087.

84. Read v. Camden, 54 N. J. L. 347, 24 Atl. 549.

85. Oliver v. Jersey City, 63 N. J. L. 96, 97, 42 Atl. 782, citing Thompson v. Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087; Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895.

### § 808. Same—illustrative cases.

The validity of an ordinance providing for an improvement may be determined on *certiorari*.<sup>86</sup> So the lowest bidder for a contract awarded to another by a municipal corporation is entitled to *certiorari* to question the validity of the award.<sup>87</sup> So the validity of an ordinance providing for the payment of an official salary may be determined by writ of *certiorari*.<sup>88</sup> So *certiorari* lies where the prosecutors are included in the descriptive words of the ordinance when its restraints on their business have been enforced against them, causing pecuniary loss, and they have submitted to it without an action and conviction.<sup>89</sup>

The revocation by a municipality of a privilege to a street railway company to use the streets, is not a judicial act so as to be subject to review by *certiorari*.<sup>90</sup> It was early held in New York that an ordinance for the construction of a common sewer is a ministerial act and cannot be reviewed on *certiorari*; however, it was held competent for the court in a proper case to vacate the estimate and assessment of the council in affirming the proceedings for its construction as it is then acting in a judicial capacity.<sup>92</sup>

A resolution of a city council to strike from the roll the name of a member seated by the preceding council before the expiration of his term and substitutes the

86. *Pope v. Union*, 32 N. J. L. (3 Vroom) 343; *State v. Bayonne*, 54 N. J. L. (25 Vroom) 293, 23 Atl. 648.

87. *State v. Trenton*, 60 N. J. L. 402, 38 Atl. 636. But see *Adleman v. Pierce*, 6 Ida. 294, 55 Pac. 658.

88. *Christie v. Bayonne*, 64 N. J. L. 191, 44 Atl. 887.

89. *State (Staates) v. Washington*, 44 N. J. L. 605, 607.

*Certiorari*. *Marion v. Chandler*, 6 Ala. 899; *Carroll v. Tuscaloosa*, 12 Ala. 173.

See chapter *post*, on actions to enforce police ordinances, subdivision 8.

90. *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 4 L. R. A. (N. S.) 321, 52 S. E. 499.

Where the passage of an ordinance is a legislative act rather than judicial, it is not subject to review by *certiorari* in Iowa. *Iske v. Newton*, 54 Iowa 586, 7 N. W. 13.

92. *People v. New York*, 5 Barb. (N. Y.) 43.



name of another person in his stead, may be reviewed by *certiorari* without awaiting action thereon by the council.<sup>93</sup>

Where an ordinance is not entirely void one not affected by it cannot question its validity on *certiorari*.<sup>94</sup> Likewise, where the private rights of the prosecutor are not involved he is not entitled to *certiorari* to set aside an illegal ordinance where the work done thereunder has so far progressed that no public interest will be subserved by interference.<sup>95</sup> And *certiorari* will not lie in favor of private prosecution to review a municipal ordinance unless it appears that such prosecution have a personal or property interest which will be specially affected in an injurious manner by the enforcement of such ordinance.<sup>96</sup>

Where work to be done under an *ultra vires* ordinance would amount to a tortious act or a public nuisance the ordinance will not be reviewed on *certiorari*; the remedy in such case being by indictment or civil action for damages.<sup>97</sup>

### § 809. Quo warranto.

*Quo warranto* may be invoked for the unwarranted assumption of public powers. Thus in an early South

93. *Roberts v. Camden*, 63 N. J. L. 186, 42 Atl. 848.

94. *Morwitz v. Atlantic City*, 73 N. J. L. 254, 62 Atl. 996.

95. *Ralph v. Atlantic Highlands*, 64 N. J. L. 721, 47 Atl. 223.

96. *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895.

97. *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782; *Jersey City v. State*, 53 N. J. L. 434, 22 Atl. 190; *State v. Trenton*, 36 N. J. L. 79.

#### Certiorari by taxpayer.

*Iowa*. *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886.

*Nebraska*. *Grand Island Gas Co.*

*v. West*, 28 Neb. 852, 45 N. W. 242.

*New Jersey*. *Lewis v. Cumberland*, 56 N. J. L. 416, 28 Atl. 553; *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 28 Atl. 578; *State v. Robbins*, 54 N. J. L. 566, 25 Atl. 471, reversing *Middleton v. Robbins*, 53 N. J. L. 555, 22 Atl. 481; *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759.

*Pennsylvania*. *Frame v. Felix*, 167 Pa. St. 47, 31 Atl. 375.

*Texas*. *Altgeld v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

Carolina case, the writ was allowed against a municipal corporation by the attorney-general, in behalf of the state, in order to test the right of the corporation to tax by ordinance certain bonds, notes and other obligations.<sup>98</sup> But the writ is generally employed to try the right of persons to exercise the functions of a public office, and not to test the legality of their acts.<sup>99</sup>

The remedy has sometimes been permitted to try the right of the local corporation to exercise civil government over added territory.<sup>1</sup> But such jurisdiction has been denied, and it has been held that it cannot be invoked to question the authority of municipal officers to exercise public functions within added territory by virtue of a legislative act. It is asserted that the proper way to test the validity of such law is to present this as

98. *State v. Charleston*, 1 Mill's Const. Rep. (S. C.) 36.

"Such use of the remedy is very rare." 4 Dillon, *Mun. Corp.* (5th Ed.), § 1559.

99. *People v. Maynard*, 15 Mich. 463; *State ex rel. v. Lawrence*, 38 Mo. 535; *State ex rel. v. Perpetual Ins. Co.*, 8 Mo. 330; *State ex rel. v. Stone*, 25 Mo. 555.

See §§ 469, 470 *ante*; 2 McQuillin, *Mo. Prac.*, § 2012 *et seq.*

*Quo warranto*. Denied at relation of a private citizen to vacate charter of a municipal corporation on account of the passage of an unauthorized ordinance fixing the price of the license for retailing liquors. "Whether *quo warranto* is the appropriate remedy for vacating an invalid ordinance we do not now determine." *Stone, J.*, in *State ex rel. v. Cahaba*, 30 Ala. 66, 68.

Denied to enforce execution of

public obligation. *Atty. Gen. v. Salem*, 103 Mass. 138.

Denied in *People ex rel. v. Hillsdale & Chatham Turnpike Co.*, 2 Johns. (N. Y.) 190.

Denied where purpose was to deprive a certain gas company of the right to lay pipe and distribute gas in the city, on the ground that it has forfeited the right by violating certain conditions imposed by the city, in granting it. The court expressed the opinion that the state was not concerned, and that the injury, if any, should be redressed by the "usual legal remedies." Per Campbell, C. J., in *People ex rel. v. Mutual Gas Light Co.*, 38 Mich. 154, 156.

1. *People v. Reclamation Dist.*, 130 Cal. 607, 63 Pac. 27; *People v. Peoria*, 166 Ill. 517, 522, 46 N. E. 1075; *State ex rel. v. Fleming*, 147 Mo. 1, 44 S. W. 758; *State ex rel. v. Mote*, 48 Neb. 683, 67 N. W. 810; *State ex rel. v. Dimond*, 44 Neb. 154, 162, 62 N. W. 498.

a defense to the enforcement of the ordinances within the extended territory, or in event of an attempt to levy and collect taxes for municipal purposes within such territory, to appeal to a court of equity to enjoin such proceedings.<sup>2</sup>

So the writ has been denied for the purpose of testing the power to pass certain ordinances. The remedy in such case is to enjoin any steps that may be taken to enforce the ordinance or to proceed by *quo warranto* against any persons who may claim to hold an office under and by virtue of the provisions of the ordinances alleged to be void.<sup>3</sup> So it has been asserted (*dictum*) that the writ will not lie for the purpose of annulling an ordinance passed in the irregular and improper exercise of a power conferred by law.<sup>4</sup>

#### § 810. Rules of construction.<sup>5</sup>

The construction of an ordinance is a question of law for the court.<sup>7</sup> The rules for the construction of state

2. *State ex rel. v. Whitcomb*, 55 Ill. 172, 177.

Testing validity of annexation of territory, § 288 *et seq. ante*.

3. *State ex rel. v. Newark*, 57 Ohio St. 430, 49 N. E. 407.

4. "Our attention has not been directed to, nor have we been able to find, any case in the books where proceedings by *quo warranto*, or information in the nature thereof, has been entertained for the purpose of declaring void or annulling a legislative act, whether passed by a state or an inferior municipal legislature." Per Cole, J., in *State ex rel. v. Lyons*, 31 Iowa 432, approved in *State ex rel. v. Newark*, 57 Ohio St. 430, 49 N. E. 407.

Examine *State v. Evans*, 3 Ark. 585.

5. *Sylvania v. Hilton*, 123 Ga. 754, 51 S. E. 744, 2 L. R. A. (N. S.) 483, citing *McQuillin*, Mun. Ord., § 289.

7. *Atlantic Coast Line R. Co. v. Adams*, 7 Ga. App. 146, 66 S. E. 494; *Pennsylvania Co. v. Frana*, 13 Ill. App. 91; *Denning v. Yount*, 9 Kan. App. 708, 59 Pac. 1092, 61 Pac. 803; *Radley v. Knepfly*, Tex. Civ. App. (1910), 124 S. W. 447.

Reasonableness is a question of law for the court. § 729 *ante*. Whether an ordinance is reasonable is a question for the court. *Long v. Jersey City*, 37 N. J. L. 348; *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528.

The construction of an ordinance should not be submitted to the jury. In this respect it stands

statutes usually apply to the construction of ordinances.<sup>8</sup>

Where the ordinance is open to two constructions, one legal, and the other illegal, if possible, the former will be adopted.<sup>9</sup> "Although it is desirable that by-laws

as a state statute. *Denver & R. G. Ry. Co. v. Olsen*, 4 Colo. 239.

Thus the construction of an ordinance requiring a railroad company to keep a flagman at a crossing is not for the jury but for the court alone. *Wilson v. New York, N. H. & H. R. Co.*, 18 R. I. 598, 29 Atl. 300.

Question of validity of an ordinance is one of law for the court when the facts are not disputed. *Lebanon v. Zanditon*, 75 Kan. 273, 89 Pac. 10.

Courts have power to determine reasonableness of ordinances in suits to enforce rights claimed thereunder. *State ex rel. v. Birch*, 186 Mo. 205, 85 S. W. 361.

8. *California*. In re Yick Wo, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139.

*Indiana*. *Zorger v. Greensburgh*, 60 Ind. 1.

*Kansas*. *Denning v. Yount*, 9 Kan. App. 708, 59 Pac. 1092, affirmed 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103.

*Maryland*. *State v. Kirkley*, 29 Md. 85.

*Missouri*. *Quinette v. St. Louis*, 76 Mo. 402.

9. *Illinois*. *Gage v. Willmette*, 230 Ill. 428, 82 N. E. 656; *Donovan v. Donovan*, 236 Ill. 636, 86 N. E. 575; *Berry v. Chicago*, 192 Ill. 154, 61 N. E. 498; *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Blanchard v. Benton*, 109 Ill. App. 569.

*Indiana*. *Smith v. New Albany* (Ind., 1910), 93 N. E. 73; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385.

*England*. *Dearden v. Townsend*, L. R. 1 Q. B. 10; *Paulterers Co. v. Phillips*, 6 Bingham's N. C. (C. P.) 314.

*Canada*. *Re Cameron and Tp. of East Nissouri*, 13 Up. Can. Q. B. 190; *Re Gibson & U. C. of H. & B.*, 20 Up. Can. Q. B. 11; *Re Borthwick and City of Ottawa*, 9 Ont. 401.

Construction — Illustrations. Bicycle ordinance. *Swift v. Topeka*, 43 Kan. 671, 23 Pac. 1075.

Salary ordinance. *Lowry v. Lexington*, 24 Ky. L. Rep. 516, 68 S. W. 1109.

Street paving ordinance. *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480.

Dogs at large—non-residents. *Commonwealth v. Dow*, 10 Met. (Mass.) 382.

Architect license. *St. Louis v. Herthel*, 88 Mo. 128.

Tax on railroad cars. *Johnson v. Philadelphia*, 60 Pa. St. 445.

Rule applied to statutory construction. *Bigelow v. West Wisconsin Railroad Co.*, 27 Wis. 478; *Iowa Homestead Co. v. Webster County*, 21 Ia. 221, per Wright, J.

Hucksters living within one mile of corporate limits. *Suell v. Belleville*, 30 Up. Can. Q. B. 81.

should be so free from doubt that 'he who runs may read,' yet as even in the case of higher legislative bodies this is not always possible; and the courts should strive so to construe a by-law as to give reasonable effect to the object aimed at."<sup>10</sup> Scrutiny unreasonably rigid will not be resorted to, in considering the meaning of by-laws.<sup>11</sup> A by-law will not be declared void because of "a want of clearness of expression or a difficulty in

Common sense construction will be applied to ordinance. In *re* Desanta, 8 Cal. App. 295, 96 Pac. 1027; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577, 77 S. W. 632.

"Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power, and a contrary conclusion will never be reached upon slight consideration. It is the province and the right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appears that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." *Ex parte Haskell*, 112 Cal. 416, 44 Pac. 725, 32 L. R. A. 527, approved in *Los Angeles County v. Eikenberry*, 131 Cal. 461, 63 Pac. 766; *Baltimore v. Clunet*, 23 Md. 449.

Interpretation will be adopted that will fully effectuate the intent of the municipal legislation. One which violates the charter or law will be avoided, if possible

and consistent, etc. *St. Louis v. Kaime*, 2 Mo. App. 66, 68.

"The by-laws of a corporation are to receive a reasonable construction, so as, if practicable, to make them consistent with the law of its incorporation, and likewise with the general and fundamental laws of the state." *Gass v. Greenville*, 4 Sneed (Tenn.) 62, 64.

"The language of a charter created for the public good will be construed liberally in order to support a by-law that tends reasonably to effect that purpose." Rule applied to ordinance forbidding Sunday sales of liquor. *Gabel v. Houston*, 29 Tex. 335, 343.

10. *England*. *Kruse v. Johnson*, 2 Q. B. 91, 93, 14 Times L. R. 416, 417, per Lord Russell of Killowen.

*Illinois*. *Chicago City Ry. Co. v. Martincic*, 138 Ill. App. 575.

*Missouri*. *St. Louis v. Eagle Packet Co.*, 214 Mo. 638, 114 S. W. 21.

11. *Whitlock v. West*, 26 Conn. 406; *Smith v. New Albany* (Ind., 1910), 93 N. E. 73; *Re Arkell and Town of St. James*, 38 Up. Can. Rep. 594, 598; *Re Croome and City of Brantford*, 6 Ontario Rep. 188, 192.

construing or adopting its provisions.”<sup>12</sup> All doubts are resolved in favor of the validity of the ordinance.<sup>14</sup> The presumption is in favor of the validity and the burden is upon the one who asserts its invalidity, to demonstrate it.<sup>15</sup>

Ordinances are to be tested by the charter, or local constitution.<sup>16</sup>

An ordinance passed by virtue of a state statute fixing the time and manner of holding certain elections has the same power and effect and is to be interpreted as part of the statute itself.<sup>17</sup>

Ordinances are to be construed in harmony with the laws and general legislative policy of the state.<sup>18</sup> Ordi-

12. *Canada*. Per Draper, C. J., in *Re Smith and City of Toronto*, 10 Up. Can. Com. Pleas 225, 228.

14. *California*. Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

*Florida*. State v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, 48 So. 639, 19 L. R. A. (N. S.) 183.

*Illinois*. Ringlestein v. Chicago, 128 Ill. App. 483.

*Missouri*. Cox v. Mignery & Co., 126 Mo. App. 669, 105 S. W. 675.

*Pennsylvania*. Johnstown v. Cent. Dist., etc. Tel. Co., 23 Pa. Super. Ct. 381.

*Wisconsin*. Stafford v. Chipewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

§ 730 *et seq. ante*.

An ordinance will be presumed to have been legally adopted unless it exceeds the legislative powers of the city. Ex parte Hinkle, 104 Mo. App. 104, 78 S. W. 317.

15. *Arkansas*. Helena v. Miller, 88 Ark. 263, 114 S. W. 237.

*Illinois*. People v. Grand Trunk,

etc. R. Co., 232 Ill. 292, 83 N. E. 839; *Plymouth v. McWherter*, 152 Ill. App. 114; *Chicago & A. Ry. Co. v. Carlinville*, 103 Ill. App. 251; compare *Schott v. People*, 89 Ill. 195.

*Indiana*. Pittsburg, etc. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461.

*New York*. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, affirming 58 Misc. Rep. 401, 111 N. Y. S. 759.

16. *Gabel v. Houston*, 29 Tex. 335.

Charter of St. Louis is the fundamental law of the city and ordinances in conflict therewith are void. *Asphalt & Granitoid Const. Co. v. Hauessler*, 201 Mo. 400, 100 S. W. 14.

17. *San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 58 Pac. 699.

18. State v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, 48 So. 639, 19 L. R. A. (N. S.) 183.

narily the ordinance will not be so construed as to effect a repeal of the general state law with which it conflicts.<sup>19</sup>

Ordinances and by-laws should be so construed as to give every part of them effect, if possible.<sup>20</sup> The court cannot insert words, qualifications or conditions and thus amend the ordinance. Its province is to construe only.<sup>21</sup> If possible, every clause and word in the ordinance will be given full force and effect.<sup>22</sup>

Ordinance prescribing fine to be paid to the city imports that it shall be paid to the city treasurer.<sup>23</sup>

An ordinance placing restrictions upon the right of citizens to labor at common and honest employment will be strictly construed.<sup>24</sup>

### § 811. Same subject.<sup>25</sup>

When the ordinance is to be treated as a contract and its words are plain and explicit in the construction the court will confine itself to the words.<sup>26</sup> A reasonable construction will be adopted.<sup>27</sup> The intent of the ordinance controls in its construction.<sup>28</sup> Objections to the

Ordinance in conflict with statute is void. *Burke v. Chicago*, 127 Ill. App. 161.

Rule applied to an ordinance taxing peddlers. *Moberly v. Hoover*, 93 Mo. App. 663, 67 S. W. 721.

19. *Bailey v. Com.*, 23 Ky. L. Rep. 1223, 64 S. W. 995.

See ch. 24 *post*.

20. *Whitlock v. West*, 26 Conn. 406.

21. *Pittsburg v. Keech Co.*, 21 Pa. Super. Ct. 548.

22. *Metropolitan Life Ins. Co. v. Darenkamp*, 23 Ky. L. Rep. 2249, 66 S. W. 1125.

23. *Scranton v. Engel*, 39 Pa. Super. Ct. 534.

24. *Felton v. Atlanta*, 4 Ga. App. 183, 61 S. E. 27.

25. *Sylvania v. Hilton*, 123 Ga. 754, 51 S. E. 744, 2 L. R. A. (N. S.) 483, citing *McQuillin, Mun. Ords.*, § 290.

26. *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 406.

27. *First Municipality v. Cutting*, 4 La. Ann. 335.

It is proper to apply liberal rules of construction to town by-laws. *Whitlock v. West*, 26 Conn. 406.

An ordinance is not void because its subdivisions are not numbered in consecutive order. *Los Angeles County v. Eikenberry*, 131 Cal. 461, 63 Pac. 766.

28. *Merriam v. New Orleans*, 14 La. Ann. 318; *Savage-Scofield Co. v. Tacoma*, 56 Wash. 457, 105 Pac. 1032.

constitutionality should be specific.<sup>29</sup> The constitutionality of an ordinance is to be tested not by what has been done under it but by what it authorized to be done by virtue of its provisions.<sup>30</sup>

All ordinances relating to the same subject should be construed together.<sup>31</sup> Thus where two ordinances are passed on the same day, one to widen a street and the other granting a franchise to a railroad company to lay its tracks in such street, they are to be construed as a single ordinance.<sup>32</sup>

The construction should be favorable to the public.<sup>33</sup> Thus where the law provides that in conferring upon a water company the privilege for a stated period to furnish water the company should charge such rates as might be "fixed by ordinance," and two constructions may be adopted—the rate fixed by ordinance to be permanent and the rate so fixed to be altered from time to time as justice may require—the latter construction being favorable to the public will be adopted.<sup>34</sup>

29. *New Orleans v. Chappuis*, 105 La. 179, 29 So. 721.

30. *Brown v. Denver*, 7 Colo. 305, 312, 3 Pac. 455; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, affirming 27 La. Ann. 20; *San Mateo County v. Southern Pac. R. Co.*, 8 Sawyer (U. S.) 238, 13 Fed. 722, 116 U. S. 138, 6 Sup. Ct. 317, 29 L. Ed. 585; *Thomas v. Gain*, 35 Mich. 155; *Stuart v. Palmer*, 74 N. Y. 183.

31. *Reynolds v. Baldwin*, 1 La. Ann. 162.

32. *Ligare v. Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 23 N. E. 934.

Statutes relating to the same matter should be considered together and that construction adopted which will give effect to all of them. *Andrew Co. ex rel.*

*v. Schell*, 135 Mo. 31, 36 S. W. 206.

And in determining the meaning of an existing statute, it is proper to consider the prior law and all changes therein. *State ex rel. v. Hostetter*, 137 Mo. 636, 39 S. W. 270.

33. *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35.

Favorable to city, when public interest conflicts with private. *Philadelphia v. Western Union Tel. Co.*, 11 Phila. (Pa.) 327.

34. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, affirming 178 Ill. 571, 53 N. E. 363.



Doubts as to whether an ordinance is invalid, as conflicting with individual rights, should be resolved against the city.<sup>35</sup>

The rule *ejusdem generis* is often applied in the construction of ordinances.<sup>36</sup>

## § 812. Title in construction.

The title of an ordinance or statute may be construed in its interpretation.<sup>37</sup> So the preamble of an act "may

35. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

36. *St. Louis v. Laughlin*, 49 Mo. 559; *State v. Schuchmann*, 133 Mo. 534, 2 S. W. 836; *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *State v. Dinisse*, 109 Mo. 434, 19 S. W. 92; *State v. South*, 136 Mo. 673, 38 S. W. 716; *St. Louis Agr. and Mech. Assn. v. Delano*, 108 Mo. 217, 18 S. W. 1101, following same case, 37 Mo. App. 284, and overruling *State v. Williams*, 35 Mo. App. 541.

Ordinance held to include horse racing though not specifically named. *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70.

The court will look to the whole ordinance to ascertain the intention. *Vinton-Roanoke Water Co. v. Roanoke*, 110 Va. 661, 66 S. E. 835.

§§ 353 to 356, *ante*.

37. *Dart v. Bagley*, 110 Mo. 42, 51, 19 S. W. 311; *Martindale v. Palmer*, 52 Ind. 411; *Portland v. Schmidt*, 13 Ore. 17, 23, 6 Pac. 221; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516.

The English rule was that "the

title cannot be resorted to in construing the enactment." *Hunter v. Nockolds*, 1 McN. & Cord 651.

"But the better rule, as we think, is to presume that the true intent and meaning is to be found in the title, unless it is plainly contradicted by the express terms of the body of the act." *Conn. Mutual Life Ins. Co. v. Albert*, 39 Mo. 181.

The title does not control. The provisions of the ordinance itself and not the title are to be construed in order to determine the class of persons to which it is intended to apply. *Spring Valley v. Henning*, 42 Ill. App. 159.

Title: "To prevent the establishment of tippling houses." The ordinance went further and forbade any sale of lager beer, ale or other malt liquor, without a license. The evidence was that defendant sold a small quantity of beer by the quart. The conviction was sustained, the court saying, "The title is unnecessary and cannot control the tenor of the enactment." *Per Dixon*, in *State (Hershoff) v. Beverly*, 45 N. J. L. 288, 291.

be used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning.”<sup>38</sup>

### § 813. Contemporaneous construction.

The general rule is that the meaning of an ordinance must be gathered from the law itself and not from contemporaneous statements of the individuals who framed it or those who voted for it.<sup>39</sup> This rule is particularly enforced where the provisions of the ordinance are clear.<sup>40</sup> In such case, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible, to aid its construction.<sup>41</sup> However, in doubtful cases where the language of the ordinance is ambiguous, a contemporaneous construction adopted by the parties interested in the

38. Dictum. Johnson, J., in *Clark v. Bynum*, 3 McCord (S. C.) L. 298, 299.

“It is, in general, true that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are intended to be remedied by the statute. This rule must not, however, be carried so far as to restrain the general words of an enacting clause by the particular words of the preamble. Although the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet if any doubt arises on the words of the enacting part, the preamble may be resorted to, to explain it.” Per Thompson, C. J., in *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89, 116.

The preamble cannot be invoked to control or restrain the obvious meaning of an ordinance. *Bohle v. Stannard*, 7 Mo. App. 51, 55.

39. *Barnes v. Mobile*, 19 Ala. 707; *Sylvania v. Hilton*, 123 Ga. 754, 51 S. E. 744, 2 L. R. A. (N. S.) 483, quoting *McQuillin, Mun. Ords.*, § 292.

40. *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201; *Beardstown v. Virginia*, 76 Ill. 34; *Frey v. Chicago, B. & Q. R. R. Co.*, 73 Ill. 399; *Stadler v. Fahey*, 87 Ill. App. 411.

41. *Wesson v. Collins*, 72 Miss. 844, 18 So. 360, 917.

A construction put upon the ordinance itself for a long period will preclude its officers from adopting a different construction. *Harrison v. People*, 97 Ill. App. 421.

enforcement of the ordinance, while not controlling, is entitled to great weight.<sup>42</sup>

Respecting a discriminating ordinance, drawn in general terms, Mr. Justice Field observes: "The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of the supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischief sought to be remedied. Besides we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know, as judges, what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the Constitution, intended for the security of personal rights, would by the general

<sup>42</sup>. *Illinois*. Wright v. Chicago, etc. R. R. Co., 7 Ill. App. 438.

*Missouri*. State ex rel. v. Severance, 49 Mo. 401.

*Nebraska*. In re Langston, 55 Neb. 310, 75 N. W. 828.

*New Hampshire*. Saunders v. Nashua, 69 N. H. 492, 43 Atl. 620.

*New Jersey*. Clark v. Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737.

The construction placed upon a franchise by the grantee will be adopted by the court where it is contrary to the construction contended for in the particular case. Kerz v. Galena Water Co., 139 Ill. App. 598.

terms of an enactment, often be evaded and practically annulled.”<sup>43</sup>

### § 814. Construction of penal ordinances.

Ordinances penal in their nature are usually subject to strict construction.<sup>44</sup> Every law in derogation of rights of property, or that takes away the estate of the citizen, ought to be construed strictly.<sup>45</sup> But ordinarily rigid rules by which the validity of penal statutes are to be tested are not applicable to the by-laws of municipal corporations. “The by-laws of very few of these corporations could stand such test. They should receive a reasonable construction, and their terms should not be strictly scrutinized for the purpose of making them void.”<sup>46</sup>

43. Per Field, J., in *Ah Kow v. Nunan*, 5 Sawyer (U. S.) 552, 560, 561 (San Francisco “Queue Ordinance”); *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200, per Mr. Justice Swayne; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. (57 U. S.) 416, 435, 14 L. Ed. 997, per Mr. Chief Justice Taney; *Scott v. Sandford* (Dred Scott case), 19 How. (60 U. S.) 393, 407, 15 L. Ed. 691, per Mr. Chief Justice Taney.

44. *Illinois*. *Chicago v. Rumpff*, 45 Ill. 90, 99.

*Kentucky*. *Krickle v. Commonwealth*, 1 B. Mon. (Ky.) 361.

*Missouri*. *St. Louis v. Dorr*, 145 Mo. 466, 37 S. W. 1108, 41 S. W. 1094, 46 S. W. 976; *State v. Gritzer*, 134 Mo. 512, 36 S. W. 39; *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *Pacific v. Seifert*, 79 Mo. 210, 215; *State v. Jaeger*, 63 Mo. 403; *St. Louis v. Goebel*, 32 Mo. 295.

*New Jersey*. *McConville v. Mayor*, 39 N. J. L. 38, 42, 43.

*New York*. *People v. Rosenberg*, 133 N. Y. 410, 415.

This is the statutory rule. *Ex parte Simms*, 40 Fla. 432, 25 So. 280.

45. *Fowler v. St. Joseph*, 37 Mo. 228.

46. Per Eustis, C. J., in *First Municipality v. Cutting*, 4 La. Ann. 335.

Reasonable construction is usually adopted. *Merriam v. New Orleans*, 14 La. Ann. 318; *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438; *Rounds v. Mumford*, 2 R. I. 154.

An ordinance which exempted auctioneers from the penalty therein imposed on persons who place goods in the streets was construed as not exempting auctioneers for nuisance at common law. *Com. v. Passmore*, 1 Serg. & R. (Pa.) 217.

Where the violation of an ordinance is invoked to avoid liability on a contract in which the city has no interest the ordinance will be strictly construed.<sup>47</sup>

# § 815. Construction of words and terms.

It is competent for the ordinance to define words and terms used therein, and such definitions will usually be controlling.<sup>48</sup> Where a resolution imposes duties on citizens in regard to care of sidewalks, with a provision that "a copy of the resolution may be served," on citizens, the word "may" will be read as "must," the resolution being in protection of public interests and imposing a duty.<sup>49</sup>

General words and phrases, which are preceded by specific enumeration, are usually limited by such particular descriptions.<sup>50</sup>

The ordinance will be construed according to its reason and spirit. A literal interpretation will be rejected if such would defeat its purpose.<sup>51</sup> In construction words will sometimes be rejected.<sup>52</sup> Words of an ordinance are construed the same as words of a statute.<sup>53</sup> The legislative intent will control the construction of a word in an ordinance though the word is inappropriate.<sup>54</sup> Usually

47. *Manker v. Tough*, 79 Kan. 46, 98 Pac. 792.

48. *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045.

Pronoun "His," as used in the organic and statutory law, applies to females as well as males, unless a different intent is exhibited by the context. *State ex rel. v. Hostetter*, 137 Mo. 636, 39 S. W. 270.

Plural number construed in *State v. Sweeney*, 93 Mo. 38, 5 S. W. 614.

49. *Doane v. Omaha*, 58 Neb. 815, 80 N. W. 54.

See §§ 380, 381 *ante*.

50. *Keokuk, etc. Co. v. Quincy*, 81 Ill. 422; *Snyder v. North Lawrence*, 8 Kan. 82; *St. Louis v. Herthol*, 88 Mo. 128; *St. Louis v. Laughlin*, 49 Mo. 559; *Grumley v. Webb*, 44 Mo. 444; *Knox City v. Thompson*, 19 Mo. App. 523; *Shultz v. Cambridge*, 38 Ohio St. 659.

51. *Indianapolis v. Huegele*, 115 Ind. 581, 588, 18 N. E. 172.

52. *State v. Acuff*, 6 Mo. 54.

53. *J. Burton Co. v. Chicago*, 236 Ill. 383, 86 N. E. 93, reversing 140 Ill. App. 344.

54. *People v. Willison*, 237 Ill. 584, 86 N. E. 1094.

the court will presume that words and phrases are used in an ordinance in their popular sense.<sup>55</sup>

"In passing upon the validity of the ordinance regard must be had to the substance rather than to the form, to the purpose and intention of the council as the same appear in the ordinance, rather than to the language of any particular clause or phrase."<sup>56</sup>

Inaccurate use of prepositions will not defeat the law.<sup>57</sup>

55. *Savago-Schofield Co. v. Tacoma*, 56 Wash. 457, 105 Pac. 1032.

56. *Chicago Cold Storage Co. v. People*, 127 Ill. App. 179.

57. *Worrell v. State*, 12 Ala. 732.

**Transposing words.** An ordinance made it an offense to be found associating with certain characters "in a public place, street, alley, common, or within said city limits," construed to read "in any public place, street, alley or common within said city," thus making the conjunction "or" to precede instead of to follow the word "common." *Zorger v. Greensburgh*, 60 Ind. 1.

**"Policy,"** in a penal ordinance forbidding "policy playing," the court will take notice of the fact that the term was in current use, in the town, when the ordinance was passed. *State v. Carpenter*, 60 Conn. 97, 102, 22 Atl. 497.

**Using wrong designation.** The charter required election of stated number of "aldermen who shall be known as the city council." The ordinance regulating municipal elections used the word "councilmen" instead of "aldermen;" held, not material, as

meaning of ordinance is the same. *State ex rel. v. Anderson*, 26 Fla. 240, 257, 8 So. 1.

The constitution authorized election of "justice of the peace." The statute provided for election of "police magistrates." The ordinance under which the election was held followed the statutory designation. Some votes were cast for "police justice," some for "magistrate," some for "police magistrate of City of Chicago." Held, terms "police magistrate" and "police justice" were equally within the meaning of the constitution and the intention of the statute. The election was held valid as the intention of the voter should govern. *People ex rel. v. Matteson*, 17 Ill. 157, 169, per Catton, J.

**Punctuation.** Must yield to manifest intention of council as expressed in an ordinance. *Charleston v. Reed*, 27 W. Va. 681, 696, 55 Am. Rep. 336.

**Usage and Custom,** when may be invoked in construing ordinances, see § 370, *ante*.

**"Council."** The word "council" in an ordinance held to mean the board of mayor and aldermen provided by charter, where char-

## § 816. Construction where ordinance void in part.

The fact that an ordinance may be void in part does not necessarily render the whole ordinance invalid. The rule established is that, where the valid parts are not necessarily dependent upon the void provisions, as where the former are independent of and not necessarily connected with the latter, and it is practicable to separate them the court will sustain those parts which are valid.

ter did not mention the word "council." *Cooke v. Loper*, 151 Ala. 546, 44 So. 78.

**Construction of words in ordinance under the English law.** By § 31 of the English Interpretation Act, 1889 (52 & 53 Vict. c. 63), words used in by-laws are, unless the contrary intention appears, to have the same meanings as in the acts conferring the power to make such by-laws. This provision merely reaffirms the common law rule. See *Blashill v. Chambers*, 14 Q. B. D. 479; "Benevolently" construed (*Kruse v. Johnson*, 2 Q. B. 91, 62 J. P. 469, 67 L. J. Q. B. 782, 78 L. T. 647, 46 W. R. 630, 14 T. L. R. 416), and if capable of two constructions, should receive that one which will make it reasonable and valid (*Edmonds v. Watermen's Co.*, 1 Jur. 727; *Reg. v. Saddlers' Co.*, 32 L. J. Q. B., at p. 360; *Dearden v. Townsend*, L. R. 1 Q. B. 10, 35 L. J. M. C. 50, 13 L. T. 323, 14 W. R. 52; *Vintner's Co. v. Passy*, 1 Burr. 239).

Where a by-law allows a person to be forbidden to sing in a street for "reasonable cause," the question of reasonableness is one for the justices (*Reg. v. Powell*, 48 J. P. 740, 51 L. T. 92).

A by-law prohibited shouting to the annoyance of "inhabitants;" it was held that annoyance to one inhabitant was sufficient to support a conviction (*Innes v. Newman*, 2 Q. B. 292, 58 J. P. 543, 63 L. J. M. C. 198, 70 L. T. 689, 42 W. R. 573, 10 T. L. R. 479); so too, in *Brahham v. Wookey*, 18 T. L. R. 99, where two constables in the street heard a man using in his house indecent language, it was held that he was properly convicted of so doing "to the annoyance of passengers or inhabitants." On a similar point, see *Mantle v. Jordon*, 1 Q. B. 248, 61 J. P. 119, 66 L. J. Q. B. 224, 75 L. T. 552, 13 T. L. R. 121.

In a "betting" by-law, the words "place of public resort" were held to apply to a piece of uninclosed land to which the public had in fact (but not as of right) free access (*Kitson v. Ashe*, 1 Q. B. 425, 63 J. P. 235, 68 L. J. Q. B. 286, 80 L. T. 323, 15 T. L. R. 172).

In *Walker v. Shetton*, 60 J. P. 313, 12 T. L. R. 363, 44 W. R. 525, a by-law requiring vehicles to carry lights was construed as applying only to vehicles in public streets. *Arnold's Mun. Corp.* (5th Ed., London), p. 52.

In other words, the valid and void parts must be entire and distinct from each other, and the former must be capable of distinct enforcement. But if the ordinance is entire, each part being essential and connected with the rest, the invalidity of one part renders the whole invalid.<sup>58</sup>

58. *Alabama.* Ex parte Bizzell, 112 Ala. 210, 21 So. 371; Birmingham v. Alabama G. S. R. Co., 98 Ala. 134, 13 So. 141; Ex parte Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328; In re Jones, 78 Ala. 419, 425.

*Arkansas.* Lackey v. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622; Brizzolara v. Ft. Smith, 87 Ark. 85, 112 S. W. 181; Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100.

*California.* San Luis Obispo County v. Greensberg, 120 Cal. 300, 52 Pac. 797; Ex parte Haskell, 112 Cal. 412, 420, 44 Pac. 725.

*Florida.* State v. Dillon, 42 Fla. 95, 28 So. 781; Tampa v. Salomonson, 35 Fla. 446, 17 So. 581; State v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, 48 So. 639.

*Georgia.* Campbell v. Thomasville, 6 Ga. App. 212, 64 S. E. 815; Jones v. Waycross, 6 Ga. App. 212, 64 S. E. 815; Fichtenberg v. Atlanta, 126 Ga. 62, 54 S. E. 933; Blackshear v. Strickland, 126 Ga. 492, 54 S. E. 966.

*Illinois.* Imes v. Chicago, B. & Q. R. Co., 105 Ill. App. 37; Johnson v. People, 202 Ill. 306, 66 N. E. 1081; Hastings Express Co. v. Chicago, 135 Ill. App. 268; Chicago & J. E. Ry. Co. v. Freeman, 125 Ill. App. 318; Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Baker v. Normal, 81 Ill.

108; Harbaugh v. Monmouth, 74 Ill. 367; Alton v. Foster, 74 Ill. App. 511; Kettering v. Jacksonville, 50 Ill. 39.

*Iowa.* Davenport Gas & El. Co. v. Davenport, 124 Iowa 22, 98 N. W. 892.

*Kentucky.* Fiscal Court, etc. v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296; McNulty v. Toopf, 25 Ky. L. Rep. 430, 75 S. W. 258; Baker v. Lexington, 21 Ky. L. Rep. 809, 53 S. W. 16.

*Louisiana.* State v. Riley, 49 La. Ann. 1617, 22 So. 843; Villavaso v. Barthet, 39 La. Ann. 247, 258, 1 So. 599.

*Maine.* State v. Robb, 100 Me. 180, 60 Atl. 874.

*Michigan.* Detroit v. Ft. Wayne, etc. R. Co., 95 Mich. 456, 54 N. W. 958; People v. Armstrong, 73 Mich. 288, 16 Am. St. Rep. 578, 2 L. R. A. 721, 41 N. W. 275.

*Minnesota.* Wykoff v. Healey, 57 Minn. 14, 58 N. W. 685; Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; Minces v. Shoenig, 72 Minn. 528, 75 N. W. 711; State v. Justus, 85 Minn. 279, 56 L. R. A. 757, 88 N. W. 759; State v. McFarland (Minn., 1905), 105 N. W. 187.

*Mississippi.* Grenada v. Wood, 81 Miss. 308, 33 So. 173.

*Missouri.* St. Louis v. Grafe-man Dairy Co., 190 Mo. 492, 1 L. R. A. (N. S.) 936, 89 S. W. 617;



Ordinances relating to the same subject are generally to be construed together. Thus where two ordinances

*St. Louis v. Liessing*, 190 Mo. 464, 1 L. R. A. (N. S.) 918, 89 S. W. 611; *Neosho Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *State ex rel. v. Cramer*, 96 Mo. 75; 8 S. W. 788; *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 58 Am. Rep. 82, 1 S. W. 305, 14 Mo. App. 221; *Carthage v. Block*, 139 Mo. App. 386, 123 S. W. 483; *Rockville v. Merchant*, 60 Mo. App. 365; *County Court v. Griswold*, 58 Mo. 175; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

*Nebraska. Zimmerer v. Stuart* (Neb., 1911), 130 N. W. 300; *Bailey v. State*, 30 Neb. 855, 47 N. W. 208; *State v. Hardy*, 7 Neb. 377.

*New Jersey. Haynes v. Cape May*, 52 N. J. L. 180, 19 Atl. 176 *State (Staates) v. Washington*, 45 N. J. L. 318, 46 N. J. L. 209; *State (Trowbridge) v. Newark*, 46 N. J. L. 140; *State (Chamberlain) v. Hoboken*, 38 N. J. L. 110; *Wiesenthal v. Atlantic City*, 73 N. J. L. 184, 63 Atl. 759.

*New York. Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; *Broadway & S. A. R. R. Co. v. New York*, 49 Hun (N. Y.) 126.

*North Carolina. State v. Weber*, 107 N. C., 962, 12 S. E. 598, 22 Am. St. Rep. 920.

*Ohio. Piqua v. Zimmerlin*, 35 Ohio St. 507; *Stever v. McConnell*, 10 Ohio Dec. 573; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436; *Burkhardt v. Cincinnati*, 6 Ohio N. P. (N. S.) 17; *Sterling v. Bowling*

*Green*, 26 Ohio Cir. Ct. 581.

*Pennsylvania. Erie v. Carey*, 12 Pa. Super. Ct. 584; *Com. v. Jackson*, 34 Pa. Super. Ct. 174.

*Texas. Ex parte Henson*, 49 Tex. Cr. App. 177, 90 S. W. 874; *Bassett v. El Paso* (Tex. Civ. App., 1894), 28 S. W. 554.

*Utah. Eureka City v. Wilson*, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. 828.

*Virginia. Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

*Washington. Hillman v. Seattle*, 33 Wash. 14, 73 Pac. 791; *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053.

*Wisconsin. State ex rel. v. Newman*, 96 Wis. 258, 71 N. W. 438; *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435; *Little Chute v. Van Camp*, 136 Wis. 526, 117 N. W. 1012; *Le Feber v. West Allis*, 119 Wis. 608, 97 N. W. 203.

*England and Canada. Fazakerley v. Wiltshire*, 1 Stra. 469; *Gunmakers' Co. v. Fell, Willes*, 390; *Reg. v. Lundie*, 8 Jur. N. S. 640; 31 L. J. M. C. 157, 10 W. R. 267, 5 L. T. N. S. 830; per Lord Kenyon in *Rex v. Faversham*, 8 Term Rep. 356, 357; *Rex v. Bumstead*, 2 Barn. & Ad. 704; *Blackpool L. B. of Health v. Bennett*, 4 H. & N. 138; *Lee v. Wallis*, 1 Ken. 295; *Ross v. United Counties of York and Peel and Town of Belleville*, 30 Up. Can. Q. B. 81; *Re Harris and City of Hamilton*, 44 Up. Can. Q. B. 641; *Reg. v. Jim Sing*, 4 British Columbia Rep. 338.

are passed on the same day and one is dependent upon the other, if one is void both must fall.<sup>59</sup>

An ordinance regulating the rate of speed of trains may be void as applied to the sparsely settled portions of the corporation where the road is fenced and the circumstances are such as not to require any restriction in the rate of speed, and valid as applied to other portions of the city.<sup>60</sup>

An ordinance operating unreasonably and oppressively in particular cases only, may be enforced except in such cases.<sup>61</sup>

Numerous illustrations of specific instances of the proper construction of ordinance void in part for various reasons, appear in the note.<sup>62</sup>

59. *Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. Rep. 558, 9 L. R. A. 69, 7 So. 885; Compare *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 28 Am. St. Rep. 715.

60. *Meyers v. C., R. I. & P. R. Co.*, 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50.

See §§ 661, 662, *ante*.

61. *North Jersey St. Ry. Co. v. Jersey City*, 74 N. J. L. 774, 67 Atl. 1072.

62. **Ordinance void in part—illustrations.** *Improvement ordinance.* *Bitzer v. Dinwiddie*, 20 Ky. L. Rep. 298, 45 S. W. 1049; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

*Discriminating in part.* *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857.

One section which is void will not invalidate other sections of the ordinance. *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584; *In re Ah Toy*, 45 Fed. 795.

*Retrospective in part, only inoperative and void to that extent.*

*Salary ordinance.* *Rau v. Little Rock*, 34 Ark. 303.

Where the section of an ordinance providing a penalty for a violation thereof is void the other parts of the ordinance are unenforceable. *Massinger v. Millville*, 63 N. J. L. 123, 43 Atl. 443.

*Ordinance imposing license upon a railroad company, its successors and assigns, though void as to successors and assigns, held valid as to railroad company.* *McPhee, etc. Co. v. Union Pacific R. Co.*, 158 Fed. 5, 87 C. C. A. 619.

An ordinance providing for an occupation tax may be valid, though part prescribing penalty for failure to pay the tax is void. *Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 Pac. 523.

Where an ordinance prescribed a fine or imprisonment and the statutes authorize only a fine, the part of the ordinance relating to imprisonment will be treated as surplusage and the ordinance upheld. *Clearwater v. Bowman*, 72 Kan. 92, 82 Pac. 526.

### § 817. Construction of ordinances—illustrative cases.

An ordinance forbidding wagons to stand on certain named streets and sell products therefrom was held not to be violated by the wagon casually stopping to sell;

An ordinance granting a franchise, though illegal in some of its provisions, will be upheld if the illegal provisions can be eliminated without destroying the franchise, and without affecting the usefulness of the ordinance. *State v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 48 So. 639.

#### Void in penalty.

*Arkansas.* *Eureka Springs v. O'Neal*, 56 Ark. 350, 19 S. W. 969.

*Iowa.* *Keokuk v. Dressell*, 47 Iowa 597.

*Massachusetts.* *Com. v. Dow*, 10 Met. (Mass.) 382.

*Nebraska.* *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 9 L. R. A. 786, 47 N. W. 280.

*New Jersey.* *Sterling v. Camden*, 65 N. J. L. 190, 46 Atl. 781; *Doran v. Camden*, 64 N. J. L. 666, 46 Atl. 724.

*United States.* *Cooper v. District of Columbia*, 11 Dist. of Col. (MacArthur & M.) 250.

#### Ordinance too comprehensive.

An ordinance covering matters beyond the jurisdiction of the local corporation, held entirely void. *Guilford v. Clark*, 2 Vent. (K. B.) 247; *Dodwell v. Oxford*, 2 Vent. (K. B.) 33.

Compare *Elwood v. Bullock*, 6 Q. B. Eng. L. R. 383; *Reg. v. Robinson*, 17 Q. B. Eng. Law Rep. 46.

**Contra.** In such case, the ordinance may be enforced in cases within the jurisdiction. *Shelton*

*v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Canova v. Williams*, 41 Fla. 509, 27 So. 30; *Schofield v. Tampico*, 98 Ill. App. 324; *Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148.

Compare (regulating sale of liquor) *Eureka v. Jackson*, 8 Kan. App. 49, 54 Pac. 5; *Cantril v. Sainer*, 59 Iowa 26, 12 N. W. 753; *New Hampton v. Conroy*, 56 Iowa 498, 9 N. W. 417; *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487.

**Valid and void parts inseparable** renders whole ordinance void. *Hannibal v. Missouri & K. Tel. Co.*, 31 Mo. App. 23; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.

Where clause defining the offense is inseparably connected with the penal clause, and the latter being void, invalidates the whole ordinance. *Landis v. Vine-land*, 54 N. J. L. 75, 23 Atl. 357.

**Conflict with charter or general law; valid and void provisions.**

*Alabama.* *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143.

*California.* In re *Mansfield*, 106 Cal. 400, 39 Pac. 775; *San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694; *Ex parte Holmquist* (Cal., 1901), 27 Pac. 1099; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747.

*Connecticut.* *State v. Smith*, 67 Conn. 541, 35 Atl. 506, 52 Am. St.

that the ordinance was intended to prevent such wagons standing in the streets for the purpose of selling and with no intention of moving until all the products therein

Rep. 301; *State v. Welch*, 36 Conn. 215, 217.

*Dakota*. *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577.

*Illinois*. *Walker v. People*, 170 Ill. 410, 48 N. E. 1010; *Illinois Central R. Co. v. People*, 161 Ill. 244, 43 N. E. 1107.

*Louisiana*. *Second Municipality v. Morgan*, 1 La. Ann. 111.

*New Jersey*. *Landis v. Vine-land*, 54 N. J. L. 75, 23 Atl. 357.

*North Carolina*. *State v. Earnhardt*, 107 N. C. 789, 12 S. E. 426.

*Conflict with State Constitution*—Rule applied.

*Arkansas*. *Rau v. Little Rock*, 34 Ark. 303.

*Iowa*. *Keokuk v. Dressell*, 47 Iowa 597.

*Louisiana*. *Villavaso v. Bar-thet*, 39 La. Ann. 247, 1 So. 599.

*Minnesota*. *State v. Kantler*, 33 Minn. 69, 21 N. W. 856.

*Missouri*. *St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221.

*Unreasonable in part*. *Eureka Springs v. O'Neal*, 56 Ark. 350, 19 S. W. 969; *Lamar v. Weidman*, 57 Mo. App. 507; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286; *Rahway Gas Light Co. v. Rahway*, 58 N. J. L. 510, 34 Atl. 3.

*Miscellaneous*. Ordinance imposing an occupation tax and providing only an illegal method for its enforcement, is rendered wholly void. *Omaha v. Harmon*, 58 Neb. 339, 78 N. W. 623; *German American Fire Ins. Co. v. Minden*, 51 Neb. 870, 71 N. W. 995.

But an ordinance providing for

licensing certain occupation and also taxing the same, the fact the latter is void does not invalidate former, which is valid, the two being severable and independent. *State ex rel. v. Schoenig*, 72 Minn. 528, 75 N. W. 711.

*Franchise ordinance granting exclusive use of streets for thirty years for laying water pipes, etc., to supply the city with water, and fixing compensation city shall pay for use of the water. The ordinance may be void as to the grant of the exclusive use, and also as to the indebtedness, yet valid as to the right of the grantee to construct the water works and lay his mains and pipes in the street for the purpose of supplying water for private use.* *Quincy v. Bull*, 106 Ill. 337.

*Statutory construction; same rule applies.*

*Alabama*. *McCreary v. State*, 73 Ala. 480; *Powell v. State*, 69 Ala. 10; *Vines v. State*, 67 Ala. 73; *Ex parte Pollard*, 40 Ala. 77.

*Massachusetts*. *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Warren v. Charleston*, 2 Gray (Mass.) 84.

*New Jersey*. *State (McClosky) v. Chamberlin*, 37 N. J. L. 338.

*New York*. *Duryee v. New York*, 96 N. Y. 477.

*Ohio*. *State v. Sinks*, 42 Ohio St. 345, 365.

*Rule applied to by-law of insurance company.* *Amesbury v. Bowditch M. F. Ins. Co.*, 6 Gray (Mass.) 596.

were sold. The purpose of the ordinance was to prohibit incumbering or obstructing the streets with vehicles, animals, etc.<sup>63</sup>

An ordinance may be too comprehensive in its provisions and cover cases which the city has no power to control, but that is no reason why courts should refuse to enforce it in cases over which the jurisdiction of the local corporation is unquestioned.<sup>64</sup>

63. *People v. Keir*, 78 Mich. 98, 43 N. W. 1039.

Regulating sale of meat, etc., at market. *Snell v. Belleville*, 30 Up. Can. Q. B. 81.

64. Ordinance too broad. Ordinance forbade sale of liquor and beer generally. City had no power as to sale of liquor by wholesale. Prosecution was for sale of beer by the glass, in what is called a "saloon" and therefore did not involve the question of the power of the city to forbid its sale as an article of commerce, to be carried beyond the limits of the city, or used for mechanical purposes. The violation of the ordinance as proved was held within the jurisdiction of city and a proper police regulation. *Kettering v. Jacksonville*, 50 Ill. 39, 41.

Contra. Where the city has only power to regulate the sale of liquor not prohibited by state statutes, an ordinance which includes all kinds of intoxicating liquor, held too comprehensive and therefore void. *Cantril v. Sainer*, 59 Iowa 26, 12 N. W. 753; *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *New Hampton v. Conroy*, 56 Iowa 498, 9 N. W. 417. Compare *Eldorado v. Burlingame*, 62 Iowa 32, 17 N. W. 148.

**Municipal limits.** Ordinance was not limited in its scope and operation to territorial limits of corporation. But the prosecution was for a sale of intoxicating liquor conceded to have been made within the corporate limits of the village. Held, valid. *Schofield v. Tampico*, 98 Ill. App. 324, 326.

**Disturbing peace.** *Charivari. St. Charles v. Meyer*, 58 Mo. 86.

A permit to open a street for the purpose of laying a drain is not to be construed as a grant of a right to lay and continue a drain, but simply as what purports to be a license to disturb the surface of the street. *Glasby v. Morris*, 18 N. J. Eq. 72.

**Several clauses.** First clause of ordinance recited that it shall be unlawful for any person, persons or corporation, etc. The second clause was connected with the first by the copulative conjunction "and." Held, in absence of anything in the ordinance to show contrary intent, the second clause should be construed as applying to and binding upon the same class of persons mentioned in the first clause. *Wright v. Chicago & N. W. R. R. Co.*, 7 Ill. App. 438, 447.

An ordinance providing that "hay bought or brought within the corporation" to be used therein, "shall be weighed on the hay-scales of the corporation erected for the mutual accommodation of seller and buyer," was construed to apply only to persons bringing hay within the limits of the corporation to be sold and used there. Thus where one purchased a stack of hay beyond the corporate limits and hauled it with his own wagons and teams within the city to be used therein at a livery stable of which he was proprietor he is not a violator of such ordinance.<sup>65</sup> So, an ordinance forbidding the sale of hay within the corporate limits, without its being first weighed by city weigher, was held not applicable to a sale made without the city to be delivered within it.<sup>66</sup>

An ordinance authorizing the issuance of bonds not to exceed a named sum was held equivalent to an ordinance fixing the amount of bonds at such sum.<sup>67</sup>

**Exceptions from Operation.** Ordinance relating to storing guano or commercial fertilizer within corporate limits, held not to apply to one who at large expense erected a building for this purpose, without objection on the part of the city authorities. The doctrine of estoppel was applied. *Athens v. Georgia R. R. Co.*, 72 Ga. 800.

**Map includes survey.** An ordinance directing one to "have a map made" authorizes the payment of making a map and the necessary survey also. *Corsicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

**65. Weighing products.** Question how are words to be understood: "All hay bought and brought within the limits of the corporation," etc. "It is obvious that the ordinance in question operates upon the seller and not upon the buyer. No one would be heard to say that it was intended to prohibit a farmer of the county

from selling a stack or load of hay, on his farm, to a member of the corporation without having the same weighed." "The by-law seems to admit of but one sensible construction, and that is, that persons bringing hay within the limits of the corporation to be sold, and used there, shall be required to sell it by weight. And of this, no just complaint can be made; for, coming voluntarily within the jurisdiction of the corporation and offering the product of their farm in the market they subject themselves to the corporate regulations, ordained for the benefit and protection of the members of the corporation." *Gass v. Greenville*, 4 Sneed (Tenn.) 62, 64.

**66. Heminger v. Cleveland**, 2 Ohio Dec. 428.

**67. Knight v. West Union**, 45 W. Va. 194, 32 S. E. 163.

An ordinance imposing penalties for projecting bow windows, porches, etc., into the street was held as only intended for the benefit of the public and that an adjacent owner had no ground of complaint in equity unless the injury to him amounts to a nuisance.<sup>68</sup>

An ordinance providing that no person having the care or ordering of a vehicle shall suffer the same to stop in a street more than twenty minutes was held to mean that no vehicle shall be allowed to make a continuous stop for more than twenty minutes.<sup>69</sup>

### § 818. Same subject.

Where an ordinance relating to cattle going at large upon the streets, etc., recited that the practice of letting cattle lie in the streets at night had become a dangerous nuisance, and then provided, first, that the owner of cattle shall pen them every night, by or before dark, under penalty for each omission; and second, that "all cattle found in the street between dark and daybreak shall be taken up and penned by the town constable and turned out the next morning," it was held that the first part did not apply to cattle of non-residents; that the penalty was directed against the owner of the beast for not penning it, and was not given for any cattle found in the streets, but for cattle not penned; that it was not given for the nuisance but for an act tending to produce it.<sup>70</sup>

68. *Jenks v. Williams*, 115 Mass. 217.

69. *Com. v. Rowe*, 141 Mass. 79, 6 N. E. 545.

70. "When an offense is made to consist of the omission to do an act in the town, he only is within the purview of the law, upon whom, by that or some other law, the act is imposed as a duty to be performed within the town. General terms used in reference

to such duty and penalty are restrained by the subject matter, and cannot be extended to persons who have no rights to be exercised and no duties to be performed within the place, since that would be to render them liable, not for the omission within the town (which is the specific offense) but for the consequential evil resulting from the omission of a similar act at another place,

So a by-law concerning licensing, regulating and restraining dogs from going at large within the town, was construed to apply only to dogs owned or kept in the town, although, in its terms, it applied to "any person permitting his dog to go at large within the town."<sup>71</sup>

An ordinance authorizing the marshal to seize sheep found running at large in the streets, etc., was held not to apply to sheep herded by competent persons within the city limits and in perfect control.<sup>72</sup>

An ordinance providing a penalty for one who should "permit" horses, etc., to run at large within the corporate limits, was held applicable to a non-resident owner living near the city who turned his horse loose, which strayed into the city. He did "permit" his horse to run at large.<sup>73</sup>

An ordinance which provides that, "no person shall put, or cause to be put in any street, sidewalk or other public place within the city limits, any dust, dirt, filth, shavings or other rubbish or obstruction of any kind," was held broad enough to embrace the obstruction of a street by a railroad company with its cars.<sup>74</sup>

at which it was no duty. There ought to be express or plain words to include such persons." *Plymouth v. Pettijohn*, 4 Dev. Law (N. C.) 591, 594, 595, per Ruffin, C. J.

71. *Com. v. Dow*, 10 Metc. (51 Mass.) 382.

A dog is "going at large" where he is following through the streets, his master, or the clerk of his master, loose, and at such a distance as that such control could not be exercised as would prevent mischief. *Com. v. Dow*, 10 Metc. (51 Mass.) 382.

**Swine at large, etc.** "No swine shall be kept in any town to be fed on swill, offal, or any other decaying substance brought from

any town except in such places as shall be designated by the town council thereof." Held, that the intent was not to forbid a person living in one town to feed his swine on swill from another town unless he kept the swine purposely to be fed in that way. The intent was not to forbid the business of keeping swine to be fed in places other than those designated for it. *State v. McMahon*, 14 R. I. 285, 287, per Durfee, C. J.

72. *Spect v. Arnold*, 52 Cal. 455.

73. *Moore v. Crenshaw*, 1 White & W. Civ. Cas. Ct. App. Tex. § 264.

74. *Illinois Central R. R. Co. v. Galena*, 40 Ill. 344, per Breese, J.



Where one section of an ordinance provides what kind of vehicles shall be licensed, and the next what amounts shall be paid for such licenses, the use of a general term of description in the latter does not enlarge the scope of the former section, but on the contrary, the general words in the latter are limited by the particular words in the former.<sup>75</sup>

### § 819. Same—who liable—landlord and tenant.

The law seeks to place responsibility upon the author of the wrong. In case of nuisance the one who creates it or suffers it to continue is made liable. Where premises are leased or rented for a specified term and the landlord surrenders for the time being to the tenant complete control thereof, as a rule, ordinances relating to keeping premises safe and free from nuisances operate directly upon the tenant and not on the landlord.<sup>76</sup>

75. *Snyder v. North Lawrence*, 8 Kan. 82; *Shultz v. Cambridge*, 38 Ohio St. 659.

See § 815 *ante*.

**Retroactive.** Ordinance providing a tribunal for municipal election contests and course of procedure may be made applicable to election contests growing out of election held before ordinance enacted. *State v. Johnson*, 17 Ark. 407.

76. **Liability of landlord and tenant.** Rule applied in civil action for damages resulting from falling into a coal hole which was not properly covered. The tenant was to keep the premises in good repair. *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 61 N. E. 439, reversing 94 Ill. App. 333.

"If the premises are so constructed, or in such a condition,

that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable." *Knauss v. Brua*, 107 Pa. St. 85, 88, per Gordon, J.

Landlord held liable to plaintiff for damages resulting from falling into a dangerous opening in a sidewalk on premises in the possession of a tenant, where it appeared that the dangerous opening was in existence before and at the time of the execution of the lease and continued in the same condition to the time of the injury. *Reading City v. Reiner*, 167 Pa. St. 41, 31 Atl. 357.

Landlord held liable to civil action for damages resulting from ice on the sidewalk in front of his premises, though the premises had been rented. *Brown v. White*, 202 Pa. St. 297, 51 Atl. 962.

Thus an ordinance which provides that, "if any person or persons shall erect and build," etc., wooden buildings within certain limits, the tenant who erects a building in violation of such ordinance is liable and not the owner of the premises.<sup>77</sup>

So under an ordinance requiring the owner, agent or occupant to abate a nuisance on the premises, a mere agent of the owner of the fee simple cannot be held punishable for failure to enter upon the premises in lawful possession of a tenant, in order to abate a nuisance within the tenant's exclusive control for the time being. "The simple statement of the question seems to furnish its answer. When an owner lets to a tenant he surrenders the entire possession and control for the term, having then no more right of entry than any stranger, unless for certain exceptional purposes affecting his future enjoyment of the freehold. Outside of such purposes, the tenant may resist his invasion of the premises as a violator of the law which protects the domicile against the world. \* \* \* The person having the actual occupancy

Owner liable for an existing nuisance at the time the premises are let. Rule applied to damages resulting from leakage from a cess-pool on the demised premises, which had been defectively constructed. But if the construction is proper and the leakage is due to subsequent neglect of the tenant, the latter alone is liable. *Wunder v. McLean*, 134 Pa. St. 334, 19 Atl. 749.

The question discussed and the above rules applied in the following comparatively recent cases:

*California.* *Morrison v. McAvoy*, 137 Cal. XIX, 70 Pac. 626; *Rider v. Clark*, 132 Cal. 382, 64 Pac. 564.

*Illinois.* *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Gridley*

*v. Bloomington*, 68 Ill. 47; *Chicago v. O'Brennan*, 65 Ill. 160.

*Massachusetts.* *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78; *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509.

*Mississippi.* *Jones v. Millsaps*, 71 Miss. 10, 14 So. 440, 23 L. R. A. 155, note.

*New York.* *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554.

*Pennsylvania.* *Fow v. Roberts*, 108 Pa. St. 489, 491, per Paxson, J.

*Wisconsin.* *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36.

*Canada.* *Organ v. Toronto (C. P.)* 24 Ont. Rep. 318.

*77. Douglass v. Commonwealth*, 2 Rawle (Pa.) 262, 265.

or control of any premises is alone responsible for a private nuisance maintained thereon. If there be a tenant or occupant, he is the party to whom the penalty will attach if he fail to obey the notice and direction provided for by the municipal regulation. If there be no occupant, then the actual control is in the owner or his agent, or both, and to him or them the ordinance will apply.”<sup>78</sup>

In a Georgia case, the ordinance made it the duty of the owner of every “untenanted or unoccupied” storehouse or building, within the corporate limits, to cause the same to be opened and ventilated at least once a week, from May to November, in every year. It appeared that the premises in question had been leased and at the time of the prosecution the term had not expired. In denying the liability of the landlord, Lumpkin, J., remarked: “He (landlord) has no right to enter upon the premises for the purpose of opening and ventilating the buildings. To do so would be to subject him to an action of trespass at the instances of the lessee. A lot thus situated is not ‘untenanted’ in the language of the ordinance. The duty of ventilation devolved upon the tenant. He is the temporary owner.”<sup>79</sup>

### § 820. Same subject.

Under an ordinance imposing a penalty on the “owner or occupier” of any house or room, the chimney of which shall take fire and blaze out at the top, the tenant is meant and not the landlord.<sup>80</sup>

78. *St. Louis v. Kalme*, 2 Mo. App. 61, 68, per Lewis, J.

79. *Shields v. Savannah*, 20 Ga. 57, 59.

80. **Tenant liable for blazing chimney.** “Words so unequivocal as to be incapable of any other interpretation would be required to show a matter so unreasonable, as that a landlord who, by a lease  
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for years, had transferred to a tenant the exclusive enjoyment and care of a house for a term, should during the term be liable for the tenant's negligence in respect to the house. \* \* \* It appears to us that the city ordinance by the alternative, owner or occupier, intended to provide that the owner should be liable,

Under an ordinance of Boston which requires the removal of snow from the adjoining sidewalk by the "tenant, occupant, and, in case there shall be no tenant, the owner," the landlord is not liable where he had let part of the premises to one tenant and part to another, although he occupies rooms in the building as a boarder with one of his tenants.<sup>81</sup>

The ordinance recited that, "no person shall cast or lay or suffer or run in or upon, or within three feet of any wharf, or in any lane, alley, lot or vacant place, \* \* \* the contents of any sink, tub, privy or cesspool," etc., under penalty. The premises had been leased for a term of five years and actually occupied by the tenant. It was ruled that the landlord was not liable.<sup>82</sup>

An employer operating a quarry may be prosecuted for a violation of an ordinance by an employe in discharging an uncovered blast, though the employer did not consent thereto.<sup>83</sup>

Under an ordinance providing that no person should obstruct any sidewalk so as to interfere with its convenient use, and that every one should keep around every flight of stairs descending from the sidewalk to the basement a fence or railing at least two feet high, it was held in a case where the owner of a building had made an opening in the sidewalk with stairs running to the cellar, the opening being provided with iron doors that constituted part of the sidewalk when closed, a use by the

if he occupied personally, or by agent, or servant, or guest; but that the occupant should be liable if there was a person in possession under some definite right, not subject to the will of the owner, him who has the title in reversion. The notion that both owner and occupier were intended to be liable, we think altogether untenable." Wardlaw, J., in *Charleston v. Blake*, 12 Rich. Law (S. C.) 66, 68.

81. *Com. v. Watson*, 97 Mass. 562.

"Owner," as used in charter relating to dangerous buildings, held not to mean agent of owner. *St. Louis v. Kaime*, 180 Mo. 309, 79 S. W. 140.

82. *New York v. Corlies*, 2 Sandf. Sup. Ct. Rep. (N. Y.) 301, 303.

83. *Spokane v. Patterson*, 46 Wash. 93, 89 Pac. 402.

tenant of the opening and doors so as to violate the ordinance rendered only the tenant liable and not the landlord.<sup>84</sup>

An ordinance providing that "no owner or occupant or other person having the control or management (of premises) shall allow any nuisance to exist or remain on the premises," under penalty of a fine, does not apply to an owner of premises which are in the possession of a tenant.<sup>85</sup>

Where the landlord and tenant are found jointly guilty of maintaining a nuisance in violation of an ordinance, the court may impose a fine on the tenant alone.<sup>86</sup>

Where a statute requires fire escapes to be attached to buildings already erected by the "owner, proprietor lessee or keeper" thereof, the duty falls upon the tenants and lessees and not upon the landlord. This is the rule of the common law.<sup>87</sup> But where a statute provides that all buildings thereafter erected shall be provided with fire escapes, the duty to provide the same falls upon the landlord.<sup>88</sup>

84. *Morrison v. McAvoy*, 137 Cal. XIX, 70 Pac. 626.

85. *People v. Kent*, 151 Mich. 134, 114 N. W. 1012.

86. *People v. Kent*, 151 Mich. 134, 114 N. W. 1012.

87. *Johnson v. Snow*, 102 Mo. App. 233.

88. *Johnson v. Snow*, 102 Mo. App. 233.

**Fire escape.** *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194, reversing 61 Hun 254, 16 N. Y. S. 820.

## CHAPTER 21.

AMENDMENT AND REPEAL OF ORDINANCES, AND HEREIN  
OF MUNICIPAL CHARTERS.

Sec.	Sec.
821. Amendment—method of making.	834. Effect of repeal—revival.
822. Void ordinance cannot be amended.	835. Same—penal ordinances.
823. Amendment of franchise and contract ordinance.	836. Same—improvement ordinances.
824. Amendment of improvement ordinances.	837. Effect of repeal and re-enactment.
825. Power to repeal ordinances.	838. Effect of revision of ordinances as to repeal.
826. Same—franchise and contract ordinances.	839. Repeal of ordinance by ordinance only.
827. Same—illustrative cases.	840. When ordinances and charter provisions are superseded by charter amendment.
828. Repeal of improvement ordinances.	841. When charter provisions supersede general laws.
829. Rules relating to repeals of charter and ordinance provisions by general laws.	842. Same subject.
830. Question of intent—illustrative cases.	843. When ordinances supersede general laws.
831. Implied or constructive repeals are not favored.	844. Effect on ordinances by surrender of special charter—change in class or grade.
832. Implied or constructive repeals are sustained.	845. Effect on ordinances on dissolution and reorganization.
833. Implied repeals of general and special ordinances.	846. Same—by consolidation or change of corporate limits.

## § 821. Amendment—method of making.

The power to enact ordinances, unless restricted, carries with it the power to make reasonable alterations and amendments.<sup>1</sup> The courts generally hold that the

1. *Foster v. Board of Pol. Comrs.*, 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763; *Swindell v. State*, 143 Ind. 153, 42 N. E. 528; *Robinson v. Maryland*, 93 Md. 208, 49 Atl. 4. Compare *Pratt v. Litchfield*, 62 Conn. 112, 25 Atl. 461; *Hunt v. Sanders*, 30 R. I. 480, 76 Atl. 179.

method prescribed for amending ordinances must be followed substantially.<sup>2</sup> Constitutional provisions as to the method of amending the state laws have no application to ordinances unless made so by express terms.<sup>3</sup> An ordinance cannot be amended by mere resolution; but, only by ordinance.<sup>4</sup>

Charters, following like provisions in State Constitutions, often provide that no ordinance shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu

2. Sometimes ordinances may be modified by subsequent legislation without direct amendment. *Bozant v. Campbell*, 9 Rob. (La.) 411.

A charter provision requiring that an ordinance revising or amending another shall contain a copy of the latter, held not to apply to an ordinance which, being repugnant to a prior ordinance on the same subject, repeals it. *Des Moines v. Hillis*, 55 Iowa 643, 8 N. W. 638.

3. *State v. Cozzens*, 42 La. Ann. 1069, 8 So. 268; *Goldsmith v. Huntsville*, 120 Ala. 182, 24 So. 509.

4. *Alabama. Jones v. McAlpine*, 64 Ala. 511.

*Illinois. People ex rel. v. Mount*, 186 Ill. 560, 578, 579, 58 N. E. 360; *Hearst's Chicago American v. Spiss*, 117 Ill. App. 436; *Hope v. Alton*, 116 Ill. App. 116, affirmed in 214 Ill. 102, 73 N. E. 406; *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853; *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *Hibbard v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621, affirming 59 Ill. App. 470; *Chicago & Northern*

*Pac. Ry. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596.

*Indiana. Chicago I. & L. Ry. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631.

*Iowa. Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333.

*Minnesota. Steenerson v. Fontaine*, 106 Minn. 225, 119 N. W. 400.

*United States. Potter v. Calumet El. St. Ry. Co.*, 158 Fed. 521.

**Method of amending.** An ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself. *C. & N. P. Ry. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *Galt v. Chicago*, 174 Ill. 605, 51 N. E. 653.

A resolution that the mayor be instructed to purchase certain property cannot, in a suit for specific performance, be amended by parol on the ground of mistake. *Carskadden v. South Bend*, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1.

For distinction between ordinance and resolution, see § 633 *ante*.

thereof; but the ordinance or section amended shall be set forth in full as amended.<sup>5</sup> This provision is generally held to mean that where a part of an act only is amended, the amended part only need be set out.<sup>6</sup>

## § 822. Void ordinance cannot be amended.

As void ordinances cannot be amended, an ordinance passed as an amendment to a previous ordinance which never took effect is invalid.<sup>6a</sup> So where an ordinance

5. Charter, City of St. Louis, art. III, § 19; Mun. Code of St. Louis (1901, McQuillin), p. 206; The Revised Code of St. Louis (1907, Woerner), p. 312; charter, San Francisco, art. II, ch. 1, § 10; Stat. & Amend. to Code of Cal., p. 245; *Best v. Broadhead*, 18 Idaho 11, 16, 108 Pac. 333; *Cowley v. Rushville*, 60 Ind. 327.

6. *Morrison v. St. Louis, I. M. & S. Ry. Co.*, 96 Mo. 602, 9 S. W. 626, 10 S. W. 148; *State v. Thurston*, 92 Mo. 325, 4 S. W. 930; *State v. Chambers*, 70 Mo. 625; *State ex rel. v. Draper*, 47 Mo. 29; *Boonville v. Trigg*, 46 Mo. 238.

**Method of making amendment.** An amended ordinance which does not attempt to amend the old by adding to or taking from one of its sections, but contains in full the section as it was designated to be when amended, sufficiently complied with a charter which requires that an amended ordinance shall contain the ordinance or parts thereof which it attempts to review or amend. *Larkin v. Burlington, C. R. & N. Ry. Co.*, 85 Iowa 492, 52 N. W. 480; *Pentecost v. Stiles*, 5 Okla. 500, 49 Pac. 921.

Where the act undertakes to amend a former statute, it is not sufficient to say that certain words are stricken out or certain words are inserted, but that the section as amended must be set out in full; however, in addition to setting out the section in full, as amended, it is not required that the amendatory act should recite the designated words stricken out, or the others inserted or both. *State ex rel. v. Miller*, 100 Mo. 439, 13 S. W. 677.

Mere reference to a section, adding "the same is hereby amended so as to authorize," etc., is bad. *French v. Woodward*, 58 Mo. 66.

When a section of an ordinance is amended, the section only, and not the entire ordinance in which it is contained, need be set out. *Decorah v. Dunstan Bros.*, 38 Iowa 96.

An amendment should be made by reference to the section and chapter, and by setting out in full such section or chapter as it is intended to read when amended. *Lowry v. Lexington*, 24 Ky. L. Rep. 516, 68 S. W. 1109.

6a. *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450.



is void, a subsequent ordinance purporting to amend a single section of the prior ordinance, and which cannot be enforced of itself, is also invalid.<sup>7</sup> So where an ordinance is passed by one branch of the legislative body at one session, and is not passed by the other until the next session, it is void, and a later amendment cannot give it any validity.<sup>8</sup> But an ordinance which contains a provision conflicting with a former ordinance is not void as an amendment thereof, under a charter which provides that no ordinance shall be revised or amended without containing the entire ordinance as amended. Such ordinance merely operates as a repeal of so much of the former ordinance as is repugnant thereto.<sup>9</sup>

Where certain provisions of an ordinance have been declared unconstitutional, such ordinance may be amended by striking out such parts.<sup>10</sup> So an ordinance merely defective, *e. g.*, one providing for improvements, may be amended.<sup>11</sup>

In accordance with the doctrine stated, an ordinance attempting to repeal a void ordinance is itself void.<sup>12</sup>

### § 823. Amendment of franchise and contract ordinances.

If vested rights are not disturbed or the obligation of contracts impaired, franchise and contract ordinances are subject to reasonable amendment. Where the state or a municipality has lawfully granted rights and privileges to either a private or public corporation, which have been accepted and valuable improvements have been made on the faith of such grant, the rule usually adopted is that a contract has been thereby entered into, and the rights acquired by such act of the legislature

7. *O'Niel v. Tyler*, 3 N. D. 47, 53 N. W. 434; *Cowley v. Rushville*, 60 Ind. 327.

8. *In re Beekman*, 11 Abb. Pr. (N. Y.) 164.

9. *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660.

10. *State v. Kantler*, 33 Minn. 69, 21 N. W. 856.

11. *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934.

See § 824 *post*.

12. *Lane-Moore L. Co. v. Storm Lake* (Iowa, 1911), 130 N. W. 924.

or municipality cannot be impaired or altered by a subsequent act, unless the right to alter or amend the franchise was expressly reserved.<sup>13</sup>

The right to alter, amend or repeal is usually expressly reserved by the state or municipality in the act granting the right or privilege, and when the franchise is accepted by the individual or corporation, the reservation becomes a part of the contract, and the franchise may be amended by subsequent legislation.<sup>14</sup> The right to alter or amend acts granting special privileges to individuals or a corporation is not always expressed in the act itself, but is sometimes found in the Constitution of the state.<sup>15</sup> The effect of a reservation of power by

13. *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 153; *Citizens' St. R. Co. v. Memphis*, 53 Fed. 715; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *State ex rel. v. The Corrigan Street Ry. Co.*, 85 Mo. 263.

Such a grant is a contract within the meaning of that clause of the Constitution of the United States which declares that no state shall make any law impairing the obligation of contracts. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

14. *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Fair Haven & W. R. R. Co. v. New Haven*, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. Ed. 237; *Marshalltown L. P. & R. Co. v. Marshalltown*, 127 Iowa 637, 103 N. W. 1005.

15. *Arkansas. Union Sawmill Co. v. Felsenthal*, 85 Ark. 346, 108 S. W. 217.

*Iowa. St. John v. Iowa Business Men's Building & Loan Assn.*, 136 Iowa 448, 113 N. W. 863.

*New York. Pratt Institute v. New York*, 91 N. Y. S. 136, 99 App. Div. 525.

*Ohio. Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357.

*South Carolina. Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811.

*West Virginia. State v. St. Mary's, etc., Petroleum Co.*, 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 51 S. E. 865.

*Wisconsin. State v. Chicago & Northwestern Ry. Co.*, 128 Wis. 449, 108 N. W. 594.

*United States. Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Northern C. Ry. Co. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491, affirming *Tex. Civ. App.*, 81 S. W. 106.

the state to alter, amend or repeal charters is the same whether it is contained in the original act of incorporation, the articles of association, in the general law or the Constitution.<sup>16</sup>

In New Jersey it appears that it is a question, in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and not within the power of the legislature to impair its obligation.<sup>17</sup>

Under a provision of the Ohio Constitution that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly," it has been held that franchises granted after the adoption of the Constitution are subject to repeal and alteration, just as if they had been expressly declared to be so by the act granting the franchise.<sup>18</sup>

Even where the power to alter and amend is reserved, the amendments made must be reasonable, and must be made in good faith, and be consistent with the scope and object of the act of incorporation.<sup>19</sup> Such a reservation will not authorize the imposing of a serious burden upon the corporation which was of no benefit to it.<sup>20</sup>

16. *Polk v. Mutual Reserve Fund Life Assn.*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, affirming 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947.

See § 763 *ante*.

17. *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352, reversing 38 N. J. L. 472.

18. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, affirming 26 Ohio St. 86.

19. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, affirming 26

Ohio St. 86; *Worcester v. Norwich Ry. Co.*, 109 Mass. 103; *Commonwealth v. Eastern Ry. Co.*, 103 Mass. 254; *Roxbury v. Boston & Providence Ry.*, 6 Cush. (Mass.) 424; *Fitchburg Ry. Co. v. Grand Junction Ry. Co.*, 4 Allen (Mass.) 198; *Commonwealth v. Essex Co.*, 13 Gray 239.

20. *Miller v. New York and Erie Ry. Co.*, 21 Barb. (N. Y.) 513.

Amendment cannot impair vested rights. Although the right of a railroad company to construct its road through a city was

Where the statute under which a street railroad company was authorized to construct its road, provides that the company shall be subject to such reasonable rules and regulations as the council may, by ordinance, prescribe, and to the payment to the city of a license fee, an ordinance afterwards passed by the city fixing the amount of license is valid.<sup>21</sup> But where the right to exact the payment of a license fee was not reserved or stipulated in the charter of the company, it was held that the city could not amend the charter and impose additional burdens by ordinances prescribing a license duty on cars.<sup>22</sup>

Where a city grants to a railway company the right to lay tracks on the streets of the city, upon the condition that the company assumes the cost of paving the streets, the city may, by a subsequent ordinance, relieve the railway company of the conditions imposed in the original grant.<sup>23</sup>

acquired under an ordinance which reserved the right to alter and amend, such an ordinance cannot be amended or repealed so as to affect essential and vested rights, or to take away rights previously granted. *Chicago, M. & St. P. Ry. Co. v. Minn. Cent. R. Co.*, 14 Fed. 525.

21. *Mayor v. Broadway, etc. Ry. Co.*, 97 N. Y. 275.

Reserved right in statute to fix water rates. Power to regulate, held to be a continuing one. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, affirming 178 Ill. 571, 53 N. E. 363.

22. *New York v. Second Ave. Ry.*, 32 N. Y. 261; *New York v. Third Ave. Ry. Co.*, 33 N. Y. 42.

Amendment cannot impose burdens. The grant by a city to a railroad company of the right to lay and maintain its track over

and along a bridge belonging to the city, in an ordinance which contains no reservation respecting toll or other charges, cannot be amended by a subsequent ordinance imposing such charges. *Des Moines v. Chicago, R. I. & P. R. Co.*, 41 Iowa 569; *Burlington v. Burlington Street Ry. Co.*, 49 Iowa 144, 31 Am. Rep. 145.

An ordinance which grants to a horse railway company the privilege of using its streets, and provides that such railway shall keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its streets with specific materials. *Kansas City v. Corrigan*, 86 Mo. 67; *State ex rel. v. Corrigan St. Ry. Co.*, 85 Mo. 263.

23. *Philadelphia v. Bowman*, 175 Pa. St. 91, 34 Atl. 353.

See §§ 759, 760 *ante*.

## § 824. Amendment of improvement ordinances.

Subject to the constitutional provision forbidding the impairment of the obligation of contracts, as explained elsewhere,<sup>24</sup> improvement ordinances which are not wholly void may be amended, even after the contract is let and the work begun, in like manner as other ordinances.<sup>25</sup> Thus an ordinance providing for street improvements which proves to be defective and insufficient to support an assessment, if not absolutely void, may be amended, and a reassessment made thereunder.<sup>26</sup> So a division of special assessments into instalments may be authorized by amendment to the original ordinance providing for the improvement.<sup>27</sup> But an ordinance providing that a pavement be laid to conform to the established grade of the street as shown by an ordinance fixing the grade of said street, now on file in the office of the city clerk, *prima facie* sufficient in its description of the grade, is fatally defective if it appears the ordinance so referred to was not then in existence, and the defect cannot be cured by the subsequent passage of an ordinance fixing the grade.<sup>28</sup>

Under the Illinois statute the illegality of an amendment to a valid improvement ordinance in respect to the mode of assessment, and the setting aside of an assessment made thereunder, will not affect the validity of the original ordinance, so as to prevent the levy and collection under it of a special tax to pay the cost of the improvement in the manner provided therein.<sup>29</sup>

24. § 753 *et seq. ante*.

25. Johnson v. People, 202 Ill. 306, 66 N. E. 108. See North Yakima v. Scudder, 41 Wash. 15, 82 Pac. 1022.

An ordinance for paving a street cannot be amended so as to change the character of the paving material by certain "orders" passed by the council on motion. The amendment must be by ordinance.

Galt v. Chicago, 174 Ill. 605, 51 N. E. 653.

26. East St. Louis v. Albrecht, 150 Ill. 506, 37 N. E. 934.

27. Trimble v. Chicago, 168 Ill. 567, 48 N. E. 416.

28. C. & N. P. Ry. Co. v. Chicago, 174 Ill. 439, 51 N. E. 596.

See § 822 *ante*.

29. Davis v. Litchfield, 155 Ill. 384, 40 N. E. 354.

See § 764 *ante*.

### § 825. Power to repeal ordinances.

The power to pass ordinances or regulations affecting the government of a municipality carries with it, by implication, the power to modify or repeal such ordinances or regulations, unless the power is restricted in the law conferring the right.<sup>30</sup> Thus an ordinance fixing the fiscal year of a municipal corporation is an administrative measure and is subject to repeal.<sup>31</sup>

Generally speaking, all ordinances are subject to repeal. The corporation cannot abridge its own legislative powers and pass irrevocable ordinances. The members of the legislative body are trustees of the public, and the tenure of their office impresses their ordinances with liability to change.<sup>32</sup> And where an ordinance granting rights to the streets expressly reserved the power of repeal, reasons which induced the passage of

30. *Delaware*. Rice v. Foster, 4 Harr. (Del.) 479.

*Florida*. Greeley v. Jacksonville, 17 Fla. 174.

*Indiana*. Welch v. Bowen, 103 Ind. 252, 2 N. E. 722.

*Iowa*. Santo v. State, 2 Iowa 165, 63 Am. Dec. 487.

*Maryland*. Robinson v. Baltimore, 93 Md. 208, 49 Atl. 4.

*Missouri*. Kaime v. Harty, 4 Mo. App. 357.

*Nebraska*. In re Hall, 10 Neb. 537, 7 N. W. 287.

*New Jersey*. Hudson Tel. Co. v. Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619.

*New York*. Chenango Bank v. Brown, 26 N. Y. 467.

*South Carolina*. Charleston v. Wentworth Street Baptist Church, 4 Strobl. (S. C.) 306.

*Canada*. In re Great Western Ry. Co., 23 Up. Can. C. P. 28.

*England*. Rex v. Bird, 13 East 367; Rex v. Ashwell, 12 East 22.

Power to repeal does not give power to amend. Charter provisions vesting in the superior court power to "repeal any by-law which it shall deem unreasonable or contrary to the laws or constitution of this state or of the United States," does not empower such court to amend a by-law. Pratt v. Litchfield, 62 Conn. 112, 25 Atl. 461.

31. Du Quoin First National Bank v. Keith, 84 Ill. App. 103, affirmed 183 Ill. 475, 56 N. E. 179; Lake Roland El. R. Co. v. Baltimore, 77 Md. 352, 20 L. R. A. 126, 26 Atl. 510.

32. State v. Graves, 19 Md. 351, 81 Am. Dec. 639; Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. Ed. 339.

a repealing ordinance cannot be inquired into by the courts, to affect its validity.<sup>33</sup>

In repealing an ordinance the city may impose such conditions as it deems proper, but the conditions, of course, must not conflict with the charter, the constitution or laws of the state. Hence an ordinance to suppress gaming may be repealed except as to offenses committed and forfeitures incurred prior thereto.<sup>34</sup>

The restrictions heretofore observed respecting the enactment of ordinances apply with equal force to the repeal of ordinances, and, indeed, to all legislative acts. Therefore changes cannot be made so as to affect any vested right lawfully acquired under an ordinance or regulation lawfully adopted.<sup>35</sup> But where it becomes necessary in order to protect the health of the city, or where the thing involved has become an actual nuisance, ordinances under which rights have become vested may be repealed, by authority of the city in the exercise of its police and governmental powers.<sup>36</sup>

33. *Southern Bell T. & T. Co. v. Richmond*, 98 Fed. 671, affirmed by U. S. Circuit Ct. App., 103 Fed. 31.

34. *Kansas City v. White*, 69 Mo. 26.

35. *Stoddard v. Gilman*, 22 Vt. 568; *New Orleans v. St. Louis Church*, 11 La. Ann. 244; *Musgrove v. Catholic Church*, 10 La. Ann. 431; *State v. Ross*, 49 Mo. 416; *State ex rel. v. Baker*, 32 Mo. App. 98; *Terre Haute v. Lake*, 43 Ind. 480; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574, reversing 3 La. Ann. 1122.

Repeal of an ordinance will not operate so as to disturb private rights vested under it. *Steener-son v. Fontaine*, 106 Minn. 225, 119 N. W. 400.

See *Morrilton Waterworks Imp. Dist. v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666.

36. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, affirming 115 Mass. 153.

The City of New York conveyed certain lands for the purpose of a church and cemetery, with a covenant for quiet enjoyment; afterwards acting under power granted by the legislature the city passed a by-law prohibiting the use of the lands as a cemetery. It was held that the ordinance was a repeal of the covenant, and that since the act was a necessary police regulation for the preservation of the lives of its citizens the city by repealing the covenant

An ordinance may be repealed in part.<sup>37</sup>

§ 826. Same—franchise and contract ordinances.

The authorities seem to be uniform to the effect that, the reservation of the right to repeal, in a franchise granted to a private person or corporation, which is accepted by the grantee, enables the legislative body granting the franchise to repeal the same at any time it may see fit.<sup>38</sup> But where the right or privilege has been acquired by an individual or corporation from the common council of the city under an act of the legislature authorizing the granting of such a privilege, it is in its nature a contract, and if the power to repeal has not been reserved, the right cannot be taken away.<sup>39</sup> Such a contract, if within the power of the municipality to grant, it seems in the case of a franchise authorizing a

was not liable for a breach of it. *Brick Pres. Church v. New York*, 5 Cow. (N. Y.) 538.

But in *New Orleans v. Church of St. Louis*, 11 La. Ann. 244, where an injunction brought by the city to restrain the defendant from using a certain piece of ground as a cemetery which use had been authorized by ordinance, which was afterwards repealed, the injunction was dissolved.

37. *Noonan v. People*, 183 Ill. 52, 55 N. E. 679; *Partridge v. Hyde Park*, 131 Ill. 537, 23 N. E. 345; *Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238.

38. *People v. O'Brien*, 111 N. Y. 1, 48, 18 N. E. 692, 7 Am. St. Rep. 684; *People ex rel. v. B. & A. R. Co.*, 70 N. Y. 569; *Southern Bell Tel. & Tel. Co. v. Richmond*, 98 Fed. 671; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961.

An act granting a franchise which is a mere license to enjoy the privilege conferred for the time, and on the terms specified, is subject to future legislative control and may be taken away by an act of the body granting it. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

39. *Brooklyn Central Ry. Co. v. Brooklyn City Ry. Co.*, 32 Barb. (N. Y.) 358; *People v. O'Brien*, 111 N. Y. 1, 42, 18 N. E. 692, 7 Am. St. Rep. 684.

A legislative act ratifying ordinances and conferring the same power of repeal as in ordinances enacted under its general powers does not authorize the repeal of an ordinance which creates a contract in the absence of general power in the city to do so. *Baltimore Trust and Guarantee Co. v. Baltimore*, 64 Fed. 153.



private person to construct a railroad in the streets of a city without reserving the power of revocation, or limitation as to time, would create in the grantee an immediate freehold interest in the streets, and the right to use them perpetually.<sup>40</sup> To guard against this absolute right, many of the State Constitutions contain a provision that, "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly;" legislatures in granting special charters to cities and public corporations, have reserved the right to alter, amend or repeal them, and municipalities, in granting special privileges under their charters, have reserved the same right.<sup>41</sup>

Where a privilege or franchise containing a reservation of the right to repeal has been accepted by the grantee, it becomes a contract and both parties are bound by its terms.<sup>42</sup> But the power to alter and amend the charter of a private corporation under such a reservation is certainly not without limit. It is admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested

40. *Milbau v. Sharp*, 27 N. Y. 611; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

41. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; *Southern Bell Tel. & Tel. Co. v. Richmond*, 98 Fed. 671; *Miller v. New York*, 15 Wall. (U. S.) 478, 21 L. Ed. 98; *New York v. Broadway Ry. Co.*, 97 N. Y. 275; *Hyatt v. McMahon*, 25 Barb. (N. Y.) 457, 467.

42. *Richmond v. Southern Bell Tel. & Tel. Co.*, 85 Fed. 19; *People v. C. W. D. Ry. Co.*, 18 Ill.

App. 125; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. Ed. 162; *Zabriskie v. H. & N. Y. Ry. Co.*, 18 N. J. Eq. 178; *Meadow Dam Co. v. Gray*, 30 Me. 547.

Right to fix water rates, held under Illinois statute to be a continuing power. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, affirming 178 Ill. 571, 53 N. E. 363; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696.

in the corporation.<sup>43</sup> Such a reservation, it has been held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another,<sup>44</sup> or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract,<sup>45</sup> or to change the vested rights acquired by the corporation under the charter, and to add new parties and managers without the consent of the corporation,<sup>46</sup> or to change the object of the incorporation or to substitute another for it.<sup>47</sup>

“However, the reserved power may be exercised, and to almost any extent, to carry into effect the original purpose of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors and for the proper disposition of its assets.”<sup>48</sup> A reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts.<sup>49</sup>

43. *Miller v. New York*, 15 Wall. (U. S.) 478, 498, 21 L. Ed. 98; *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500, 519, 21 L. Ed. 133, affirming 104 Mass. 446, 6 Am. Rep. 247; *Commonwealth v. Essex Co.*, 13 Gray (Mass.) 239, 253; *Miller v. Railroad Co.*, 21 Barb. (N. Y.) 513; *Coast Line Ry. Co. v. Savannah*, 30 Fed. 646.

44. *State ex rel. Pittman v. Adams*, 44 Mo. 570.

45. *Railroad Co. v. Veazie*, 39 Me. 571, 581.

46. *Sage v. Dillard*, 15 B. Mon. (Ky.) 340, 357.

47. *Zabriskie v. H. & N. Y. Ry. Co.*, 18 N. J. Eq. 178.

48. Per Justice Clifford in *Miller v. New York*, 15 Wall. (U. S.) 478, 498, 21 L. Ed. 98.

To the same effect, *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500, 519, 21 L. Ed. 133, affirming 104 Mass. 446, 6 Am. Rep. 247; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 21 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836, affirming 66 Me. 488; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496.

49. *People v. O'Brien*, 111 N. Y. 1, 48, 18 N. E. 692, 7 Am. St. Rep. 684; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. Ed. 77, affirming 69 Ill. 80.

The power of the state to alter, amend or repeal corporate franchises does not authorize law impairing the obligation of contracts between the corporation and third persons. *Omaha Water Co. v.*

As we have seen, all rights granted by a municipality are subject to the police power of the state, and if the public safety or the public morals require the discontinuance of any manufacture or traffic which has been granted to an individual or corporation, it has power to provide for its discontinuance, even where no right has been reserved to alter or amend the charter of the corporation.<sup>50</sup>

§ 827. Same—illustrative cases.

A franchise granted by ordinance to a corporation to furnish water for the use of the inhabitants is a contract which the city cannot repeal, alter or impair without the consent of the corporation; hence an ordinance attempting to reduce the water rates, which the corporation was authorized to charge, was held invalid where the right to change was not reserved in the original grant of the franchise.<sup>51</sup> So where the right to lay double tracks in the streets is granted to a railroad company and the company expends a large amount of money in the construction of its railway, the city cannot afterwards, by another ordinance, limit the company to a single track.<sup>52</sup> So where a city, by ordinance, grants the right to one to construct water works at his expense to supply the city and its inhabitants with water, with the right to lay water pipes under the surface of the streets and alleys, for a period of years, which grant is accepted and the work partially performed, the privilege of the use of the streets is not a mere license, revocable at the pleasure of the

Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736.

Internal conduct of corporation may be regulated by the legislature under the reserved power to alter, amend or repeal franchises. *Hinckley v. Schwarzschild*, 95 N. Y. S. 357, 107 App. Div. 470.

2 McQ.—55

50. *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, affirming, 115 Mass. 153; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036, affirming 70 Ill. 634.

51. *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

52. *Burlington v. Burlington St. Ry. Co.*, 49 Iowa 144, 31 Am. Rep. 145.

city council, but it is a grant under an express contract, for an adequate consideration, and is binding as a contract.<sup>53</sup>

And where a contract is made with a municipal corporation upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition.<sup>54</sup> Hence where a police jury having canvassed and compiled the returns of an election, proclaim the result of the same to have been in favor of a special tax in aid of a railway enterprise, and in accordance therewith thereafter passed an ordinance levying the tax, it is without legal capacity to subsequently pass another ordinance repealing the former and annulling the tax; the railway having been, in the meantime, completed and put in operation.<sup>55</sup>

An ordinance which regulates the use of a certain street, upon which railroad tracks had been laid under a prior ordinance, by prohibiting the use upon it of any car or other vehicle drawn by steam, does not repeal or take away the former right, and does not destroy vested rights.<sup>56</sup> And it has been held that an ordinance giving to a gas light company the exclusive right to light a city with gas for thirty years is not repealed nor the rights acquired under it "impaired" by a subsequent contract

53. *Quincy v. Bull*, 106 Ill. 337. Right to regulate water rates reserved by statute. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, affirming 178 Ill. 571, 53 N. E. 363; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696.

54. *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574, reversing 33 La. Ann. 1122; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090, reversing 31 La. Ann. 1.

55. *Missouri, Kansas & T. Trust Co. v. Smart*, 51 La. Ann. 416, 25 So. 443.

56. *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734, affirming 26 Gratt. 83.

with another company to light the streets with electricity.<sup>57</sup>

Where a telephone company under the code of Virginia must obtain consent of the council of a city or town to authorize the use of its streets by a telephone or telegraph line, and the company acquired the right to erect and maintain its poles and wires in the streets of a city through an ordinance, the terms of which it accepted, it is bound by a provision of such ordinance reserving to the council the right to repeal the same at any time, the condition being that the repeal take effect twelve months from its date, and its right to maintain its lines in the streets terminates at the expiration of a year from the date of the passage of the repealing ordinance.<sup>58</sup>

### § 828. Repeal of improvement ordinances.

Unless the violation of constitutional rights results, improvement ordinances may be repealed under like conditions and restrictions as other municipal legislation. Thus where no steps have been taken under an ordinance for paving a street, the city council may, by a later ordinance for paving intersecting streets with different kinds of pavement, repeal so much of the earlier ordinance as applies to the area covered by the street intersection, without otherwise affecting its validity.<sup>59</sup> The rules hereinafter stated respecting repeals of ordinances by implication apply to those providing for improvements as shown by the cases in the notes.<sup>60</sup>

57. *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 529.

§ 761 *ante*.

58. *Southern Bell Telephone & Telegraph Co. v. Richmond*, 93 Fed. 671.

The company by accepting the privilege has placed itself within the absolute dominion of the city council. *Richmond v. Southern Bell Tel. & Tel. Co.*, 85 Fed. 19, 27.

59. *Noonan v. The People*, 183 Ill. 52, 55 N. E. 679.

60. *Repeals of improvement ordinances by implication.* Where successive ordinances appropriating money for the paving of different streets were passed, and the aggregate sum appropriated exceeded the sum available for such purpose, it was held that the rule "that where two acts are repugnant in any of their provisions

An ordinance for paving and curbing the middle portion of a street and for grading the space on each side of the pavement, is not repealed by a subsequent ordinance authorizing a street railway company to lay its tracks on one side of the street, over the graded portion but outside the curb line fixed by the prior ordinance, even though the late ordinance requires the company at its own expense to pave the part of the street occupied by its tracks.<sup>61</sup>

Where an ordinance for the improvement of a street is repealed in part by a subsequent one, or such ordinance is so changed as to provide for the construction of a viaduct in a certain part of the street, whereby a part of the improvement is abandoned, a special assessment for

the latter act without any repealing clause operates as a repeal of the first," did not apply, and that the last ordinance passed did not repeal the prior ordinances. *Smyrk v. Sharp*, 82 Md. 97, 33 Atl. 411.

After an injunction was granted restraining a contractor and the city from proceeding with the opening and improvement of a proposed street, the ordinance directing the work to be done was repealed, and upon motion to dissolve the injunction it was held that the repeal of the ordinance was conclusive in favor of the injunction. *Kalme v. Hart*, 4 Mo. App. 357.

Where a new charter is adopted which provides that all ordinances shall continue in force until repealed, and public work is let to be done in the manner provided by a later ordinance, the latter repeals the old ordinances as to

the mode of letting such work. *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458.

A statute under which an ordinance authorizing street improvements was passed, was expressly repealed and another statute substituted therefor which contained similar provisions. It was held that the ordinance authorizing the improvements was not repealed, since it was not in conflict with the new provisions. *Allen v. Davenport*, 107 Iowa 90, 95, 77 N. W. 532.

Improvement ordinance may be repealed by implication. *Thompson v. Highland Park*, 187 Ill. 265, 58 N. E. 328; *McPike v. Alton*, 187 Ill. 62, 58 N. E. 301; *Morrilton Waterworks Imp. Dist. v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666.

61. *Thomson v. People*, 184 Ill. 17, 56 N. E. 383.

the whole cost of the work as originally intended will not be sustained.<sup>62</sup>

Any change by amendment, repeal, or otherwise in the improvement ordinance which contravenes the legal rights of the property owner, or which affects the method of payment for the work so as to subject the contractor to greater risk or requires him to accept less money than he contracted to receive, or otherwise affects the method of payment to his detriment, is within the constitutional provision prohibiting the impairment of the obligation of contracts. This principle is fully considered and illustrated in the chapter on the constitutionality of ordinances.<sup>63</sup>

#### § 829. Rules relating to repeals of charter and ordinance provisions by general laws.

Where a contrary intention is not manifest, the general rules relating to repeals by general laws of charter and ordinance provisions and legislative acts applicable to municipal corporations, which, in effect, become constituent parts of their charters, may be thus summarized:

1. A later statute which is general does not repeal a former one that is particular,<sup>64</sup> unless negative words are used, or the acts are so entirely inconsistent that they cannot stand together.<sup>64a</sup> Thus laws existing for the benefit of particular municipalities, ordinarily are not repealed by general laws relating to the same subject-matter.<sup>65</sup>

62. *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543.

A special assessment cannot be levied to pay for a part of the improvement required by an ordinance, nor can a special assessment be levied to pay for the whole after a part has been abandoned. *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543; *Dorathy v. Chicago*, 53 Ill. 79; *Holmes*

*v. Hyde Park*, 121 Ill. 128, 13 N. E. 540.

63. §§ 764 to 770 *ante*.

64. *Haywood v. Savannah*, 12 Ga. 404, 409, per Lumpkin, J.

64a. *State v. Severance*, 55 Mo. 378, 386, per Wagner, J.

65. *Harrisburgh v. Sheck*, 104 Pa. St. 53; *Ottawa v. La Salle County*, 12 Ill. 339; *State v. Branin*, 23 N. J. L. 484; *Wood v. Election Comrs.*, 58 Cal. 561.

2. Where there is a difference in the whole purview of two statutes, apparently relating to the same subject-matter, the former remains of force.<sup>66</sup>

3. Where it is evident that a subsequent act seeks to revise the entire subject-matter, embracing all that was intended to be preserved in the old, and omitting what was not so intended, or where the last act covers the entire subject-matter embraced in the first and also contains additional provisions, the last act supersedes the former and repeals it by implication.<sup>67</sup>

4. Where the subsequent general law and prior special law, charter or ordinance provisions do not conflict they both stand;<sup>68</sup> but this result must depend, of course upon the *legislative intent* which is to be ascertained from an examination and comparison of the whole course of legislation relating to the subject under consideration.<sup>69</sup>

5. Constructive repeals or repeals by implication are not favored.<sup>70</sup>

66. *People v. Hanrahan*, 75 Mich. 611, 622, 42 N. W. 1124; *Bowen v. Lease*, 5 Hill (N. Y.) 221.

67. *Murdock v. Memphis*, 20 Wall. (U. S.) 590, 616, 22 L. Ed. 429, per Mr. Justice Miller.

*California*. *Pierpont v. Crouch*, 10 Cal. 315.

*Massachusetts*. *Bartlett v. Kurg*, 12 Mass. 545

*Mississippi*. *State Board of Education v. Aberdeen*, 56 Miss. 518.

*Nebraska*. *Brome v. Cuming County*, 31 Neb. 362, 47 N. W. 1050, 34 Am. & Eng. Corp. Cas. 431.

*New Hampshire*. *Leighton v. Walker*, 9 N. H. 59.

*New York*. *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Dexter & L. Plank R. Co. v. Allen*, 16 Barb. (N. Y.) 15.

*United States*. *U. S. v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082, affirming 14 Blatch. 55, Fed. Cas. No. 14,799; *Daviess v. Fairbairn*, 3 How. (U. S.) 636, 11 L. Ed. 760; *United States v. Tynen*, 11 Wall. (U. S.) 88, 20 L. Ed. 153.

68. *State v. Harrison*, 9 Mo. 526; *Baldwin v. Green*, 10 Mo. 410; *State v. Cowan*, 29 Mo. 330; *Simpson v. Savage*, 1 Mo. 359; *State v. Simonds*, 3 Mo. 414; *State v. Payne*, 4 Mo. 377.

69. *State v. Severance*, 55 Mo. 378, 386, per Wagner, J.; *Union Pac. Ry. Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098, reversing 2 Wyo. 408; *Fish v. Branin*, 28 N. J. L. 484; *People v. Clunie*, 70 Cal. 504, 11 Pac. 775.

70. §§ 831, 832 *post*.



6. Laws respecting matters which naturally fall within the domain of municipal government, or which relate alone to the government of cities, are not superseded by legislative enactments although general in form.<sup>71</sup>

7. Notwithstanding the act amending the charter by its terms repeals all parts of former acts inconsistent with its provisions, it will not have the effect of repealing the section of a prior act corresponding in substance with a section of the new act where the latter section is unconstitutional.<sup>71a</sup>

8. Whether an ordinance is in apparent or real conflict with a general law, or whether it will supersede such law is to be determined by the same principles applicable to charter provisions.<sup>72</sup>

These rules are more fully considered and illustrated in the sections which follow.

### § 830. Question of intent—illustrative cases.

“Whenever the intent to repeal a special act by a general statute is apparent, the legislative intent will be effectuated.”<sup>73</sup> Thus a general statute relating to taxing railroads was held to repeal by implication prior special charter power of municipalities respecting the same subject. In this case it was said: “It is really a question of intention, and where the legislative intent is manifest or apparent it must prevail;” and the intention was regarded as manifest from the scope and purpose of the whole act, although negative words or words

71. *State ex rel. v. Field*, 99 Mo. 352, 12 S. W. 802; *Kansas City v. Scarritt*, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 472, 41 S. W. 943; *Tacoma G. & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W.

457, 41 Am. St. Rep. 663; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372.

See § 216 *ante*.

71a. § 834 *post*.

72. §§ 841 to 843 *post*.

73. *Fitzgerald v. New Brunswick*, 47 N. J. L. 479, 481.

of repeal were not used.<sup>74</sup> A like ruling was afterwards made by the same court when it was held that a general law relating to the assessments and taxation of railroads, and providing a method for the entire state for extending and collecting taxes on railroad property, superseded a charter provision covering the same subject-matter.<sup>75</sup>

As a rule, general legislation supersedes inconsistent special legislation relating to the same subject although the latter is not expressly repealed.<sup>76</sup> Thus a legislative act which in terms applies to all cities of the state will be construed as repealing inconsistent charter provisions.<sup>77</sup> A law providing for a uniform system of registration of voters and election of municipal officers will supersede charter provisions covering the same subject.<sup>78</sup>

Within its constitutional powers the legislature may modify or repeal municipal ordinances. Such repeals need not be in express terms. If the intention to repeal clearly appears, the ordinances must give way to the

74. Per Wagner, J., in *State ex rel. v. Severance*, 55 Mo. 378, 386. The court observed: "There is no question concerning the now generally admitted rule that a general affirmative statute will not repeal a former one, which is special or particular in its nature, unless negative words are used, or the acts be so entirely inconsistent that they cannot stand together. In such case there is nothing but an implication of repeal, and repeals in that manner are not favored."

75. *State ex rel. v. St. Louis & San Francisco Ry. Co.*, 117 Mo. 1, 12, 22 S. W. 910.

76. *State v. Morristown*, 33 N. J. L. 57; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *Chicago*

*Dock & C. Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448.

77. *State (Bowyer) v. Camden*, 50 N. J. L. 87, 11 Atl. 137; *State v. Spaude*, 37 Minn. 322, 34 N. W. 164.

78. *St. Louis v. Hoblitzelle*, 85 Mo. 64, reversing 15 Mo. App. 441; *State ex rel. v. Owsley*, 122 Mo. 68, 26 S. W. 659; *Staude v. Board of Election Commissioners*, 61 Cal. 313.

In California it has been held that a general law providing for police courts in cities and towns will take the place of charter regulations on the same subject. *People ex rel. v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Ex parte Ah You*, 82 Cal. 339, 342, 22 Pac. 929.

legislative act so far as they are in conflict with it.<sup>79</sup> Hence a legislative act creating the office of excise commissioner and giving him control of city dramshops and licenses therefor, repeals conflicting ordinances on the same subject.<sup>80</sup>

The re-enactment in the revision of state statutes relating to municipal corporations of a provision authorizing the enactment of an ordinance for the determination of election contests was held in Kansas not to abrogate such an ordinance passed in pursuance of the earlier statute.<sup>81</sup> Such ordinance, it was also held, was not to be considered as repugnant to the Australian ballot law and other statutory provisions governing elections so as to be impliedly repealed thereby.<sup>82</sup>

A general statute, passed in pursuance of a constitutional provision that the legislature shall not pass any local or special laws regulating municipalities, but shall enact general laws relative thereto, was held in New Jersey to repeal all inconsistent provisions in a municipal charter, and this was declared to be the rule whether there are words of express repeal or not.<sup>83</sup>

In California the rule has been announced that a general law relating to police courts and also one relating

79. *People v. Furman*, 85 Mich. 110, 48 N. W. 169; *Mulcahy v. Newark*, 57 N. J. L. 513, 31 Atl. 226; *Com. v. Gillam*, 8 Serg. & R. (Pa.) 50.

80. *State ex rel. v. Bell*, 119 Mo. 70, 75, 24 S. W. 765; *State ex rel. v. Higgins*, 125 Mo. 364, 28 S. W. 638.

Subsequent constitutional amendments will repeal conflicting charter provisions. *Donahue v. Graham*, 61 Cal. 276; *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798; *Hagerstown v. Dechert*, 32 Md. 369; *Public*

*School Trustees v. Taylor*, 30 N. J. Eq. 618.

Conflict must exist, otherwise special municipal charter stands. *People ex rel. v. Jobs*, 7 Colo. 475, 4 Pac. 798.

Prospective provisions in revising act. *Reading v. Heppleman*, 61 Pa. St. 233.

81. *Carney v. Neeley*, 60 Kan. 672, 57 Pac. 527, citing *Cass v. Dillon*, 2 Ohio St. 607; *Chamberlain v. Evansville*, 77 Ind. 542.

82. *Carney v. Neeley*, 60 Kan. 672, 57 Pac. 527.

83. *Lewis v. Newark*, 74 N. J. L. 308, 312, 65 Atl. 1039.

to local assessments, passed subsequent to a charter, will supersede the charter.<sup>84</sup>

§ 831. Implied or constructive repeals are not favored.<sup>88</sup>

“Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statute. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative or cumulative or auxiliary, and not inconsistent, both must stand, and the former is not repealed.”<sup>89</sup> Thus

84. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771.

See *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860, principal and dissenting opinion; *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817.

88. *Arkansas. Babcock v. Helena*, 34 Ark. 499, 503.

*Connecticut. Norwich v. Story*, 25 Conn. 44, 47.

*Georgia. Haywood v. Savannah*, 12 Ga. 404, 409.

*Illinois. Thompson v. Highland Park*, 187 Ill. 265, 58 N. E. 328; *People v. Harrison*, 185 Ill. 307, 56 N. E. 1120.

*Michigan. Gordon v. People*, 44 Mich. 485, 7 N. W. 69; *People v. Bussell*, 59 Mich. 104, 109, 26 N. W. 306.

*Missouri. Pacific Ry. Co. v. Cass County*, 53 Mo. 17; *State v. Jaeger*, 63 Mo. 403; *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *State ex rel. v. Severance*, 55 Mo. 378; *St. Louis v. Independent Ins. Co.*, 47 Mo. 146; *McVey v. McVey*, 51 Mo. 406; *St. Louis v. Life Assn.*, 53 Mo.

466; *State v. Draper*, 47 Mo. 29; *State v. Fitzporter*, 17 Mo. App. 271; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516.

*New Jersey. Landis v. Landis*, 39 N. J. L. 274.

*New York. Jamestown v. Home Tel. Co.*, 125 N. Y. App. Div. 1, 5, 109 N. Y. S. 297.

*Pennsylvania. Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231.

*Rhode Island. Providence v. Union R. R. Co.*, 12 R. I. 473.

*South Dakota. Mitchell v. Dakota Central Tel. Co. (S. Dak., 1910)*, 127 N. W. 582.

*Washington. State v. Taylor*, 21 Wash. 672, 59 Pac. 489; *Snell v. Jones*, 49 Wash. 582, 96 Pac. 4;

*Wisconsin. State v. Milwaukee Electric R., etc., Co.*, 144 Wis 386, 129 N. W. 623.

The rule relating to repeal of state statutes applies. *Johnson v. Hahn*, 4 Neb. 146; *Goddard v. Boston*, 20 Pick. (Mass.) 407; *Whitney v. Blanchard*, 2 Gray (Mass.) 208; *Pierspont v. Crouch*, 10 Cal. 316.

89. *People v. Hanrahan*, 75 Mich. 611, 622, 42 N. W. 1124,

a general statute will not impliedly repeal a prior local or special statute, unless there is such a positive repugnance between the two that they cannot stand together or be consistently reconciled.<sup>90</sup>

Since the law does not favor a repeal by implication, it has accordingly been held that where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former.<sup>91</sup> The earlier act remains in force, unless the two are manifestly inconsistent with and repugnant to each other.<sup>92</sup> An act is not repealed by implication where the legislature had no intention to repeal it.<sup>93</sup>

90. *St. Louis v. Alexander*, 23 Mo. 483; *Deters v. Renick*, 37 Mo. 597; *State ex rel. v. Probate Court*, 38 Mo. 529; *State ex rel v. Macon County*, 41 Mo. 453; *St. Louis v. Independent Ins. Co.*, 47 Mo. 146; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372; *Waller v. Everett*, 52 Mo. 57; *State ex rel. v. Edwards*, 136 Mo. 360, 38 S. W. 73; *State ex rel. v. Heidorn*, 74 Mo. 410; *State ex rel. v. Dolan*, 93 Mo. 467, 473, 6 S. W. 366; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457; *State ex rel. v. Slover*, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; *State ex rel. v. Stratton*, 136 Mo. 423, 38 S. W. 83.

If a conflict exists the general law will prevail, as a law regarding streets. *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448.

Street improvements. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615, where it is held that the repeal cannot act retrospectively or disturb private rights vested thereunder.

91. *People v. Mount*, 87 Ill. App. 194, affirmed in 136 Ill. 560, 58 N. E. 360; *Bruce v. Schuyler*, 9 Ill. 221; *Blain v. Bailey*, 25 Ind. 165.

92. *Bowen v. Lease*, 5 Hill (N. Y.) 221.

93. *Tyson v. Postlethwaite*, 13 Ill. 728.

**Implied repeals of ordinances.** When a subsequent ordinance does not repeal a prior one by implication. *New York v. Wood*, 15 Daly (N. Y.) 341, 6 N. Y. S. 657; *Martineau v. Rochester Ry. Co.*, 81 Hun (N. Y.) 263, 30 N. Y. S. 778; *Eidemiller v. Tacoma*, 14 Wash. 376, 44 Pac. 877.

Two ordinances which are not in conflict with or repugnant to each other, the later does not repeal the former. *People v. Harrison*, 185 Ill. 307, 56 N. E. 1120; *Barker v. Smith*, 10 S. C. 226.

What do not constitute implied repeals of ordinances. *Joliet v. Petty*, 96 Ill. App. 450; *Greensboro v. Mullins*, 13 Ala. 341.

A valid ordinance cannot be impliedly repealed by an invalid one

### § 832. Implied or constructive repeals are sustained.

Accordingly, ordinances may be repealed by implication.<sup>94</sup> Thus where an ordinance contains a provision plainly repugnant to a former ordinance, to the extent that there is a conflict, the former ordinance is repealed by implication.<sup>95</sup> So a subsequent ordinance fully covering the subject-matter of an earlier ordinance, being a substitute therefor, repeals the former by implication, without words to that effect.<sup>96</sup> But an ordinance which

*Lane-Moore Lbr. Co. v. Storm Lake* (Iowa, 1911), 130 N. W. 924.

A particular ordinance forbidding animals from running at large and a subsequent ordinance referring to the prior ordinance and referring to other animals, etc., held not to operate to repeal but to enlarge its scope. *Jeans v. Morrison*, 99 Mo. App. 208, 73 S. W. 235.

"An ordinance is not repealed by implication when another ordinance not inconsistent therewith, and not covering the same field is subsequently passed." *Montclair v. Scola*, 76 N. J. L. 137, 69 Atl. 451.

94. *Wethington v. Owensboro*, 21 Ky. L. Rep. 960, 53 S. W. 644; *Grand Rapids v. Norman*, 110 Mich. 544, 68 N. W. 269; *De Lano v. Doyle*, 120 Mich. 258, 79 N. W. 188.

95. *Ex parte Wolf*, 14 Neb. 24, 30, 14 N. W. 660.

The rule relating to repeal of state statutes applies. *Johnson v. Hahn*, 4 Neb. 139, 146; *Goddard v. Boston*, 20 Pick. (Mass.) 407, 410; *Whitney v. Blanchard*, 2 Gray (Mass.) 208; *Pierpont v. Crouch*, 10 Cal. 315.

96. *Indiana*. *Coghill v. State*, 37 Ind. 111; *Blakemore v. Dolan*, 50 Ind. 194.

*Iowa*. *Decorah v. Dunstan Bros.*, 38 Iowa 96.

*Michigan*. *Lenz v. Sherrott*, 26 Mich. 139; *Delano v. Doyle*, 120 Mich. 258, 79 N. W. 188, 6 Det. Leg. N. 120, approving *United States v. Tynen*, 11 Wall. (U. S.) 88, 92, 20 L. Ed. 153.

*New Jersey*. *Burlington v. Estlow*, 43 N. J. L. 13.

*New York*. *Dexter v. Allen*, 16 Barb. (N. Y.) 15.

*Ohio*. *Lorain Plank Road v. Cotton*, 12 Ohio St. 263.

*Tennessee*. *Schmalzreid v. White*, 97 Tenn. 36, 32 L. R. A. 782, 36 S. W. 393.

*West Virginia*. *Knight v. West Union*, 45 W. Va. 194, 32 S. E. 163.

*United States*. *Norris v. Crocker*, 13 How. (U. S.) 429, 14 L. Ed. 210.

**Repeal by later laws—illustrations.** The rule that the later statute clearly intended to prescribe the only rule which should govern the case provided for should be construed to repeal the earlier has been applied to ordinances.

is described in the caption as amending a former ordinance, yet in fact amending only one section thereof, and making no reference to the subjects of the other sections

*Roche v. Jersey City*, 40 N. J. L. 257.

An ordinance prohibiting the sale of spirituous liquors under a penalty is repealed by a subsequent ordinance prohibiting their sale without a license. *Barton v. Gadsden*, 79 Ala. 495.

A subsequent ordinance revising the whole subject of selling or delivering any spirituous liquors will be held to be a substitute for all prior regulations on the same subject although words of repeal are not used. *Booth v. Carthage*, 67 Ill. 102.

And upon such repeal the general law immediately prevails unless the subsequent ordinance provides a penalty for such sale. *Von Der Leith v. State*, 60 N. J. L. 46, 37 Atl. 436.

A subsequent ordinance provided that a former one "is hereby amended so as to read as follows," repeals all provisions of the former ordinance not contained in the latter. *Ashland Water Co. v. Ashland Co.*, 87 Wis. 209, 58 N. W. 235.

When subsequent ordinance repeals a prior one by implication in particular case, statute as to repeals, held not to apply to ordinances. *Naylor v. Galesburg*, 56 Ill. 285, 287.

A statute perfect in itself may repeal another part of a law by implication, although such repeal is not expressed in the title of the repealing statute. *Union Trust*

*Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24.

A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first. *Commonwealth v. Cooley*, 10 Pick. (Mass.) 37, 39; *Farr v. Brackett*, 30 Vt. 344; *Conley v. Sup'rs Calhoun Co.*, 2 W. Va. 416.

Where the later statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. *Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 Cal. 501; *United States v. Tynen*, 11 Wall. (U. S.) 88, 20 L. Ed. 153.

No specific provision for repeal is necessary where it appears that the new ordinance is intended to replace the old. *Indianapolis & E. Ry. Co. v. New Castle*, 43 Ind. App. 467, 87 N. E. 1067.

Where an ordinance providing for an election was amended by changing the date, and thereafter an ordinance was passed repealing the amended ordinance, the entire ordinance as amended was repealed, at least by implication. *Kierman v. Portland, Ore.* (1910), 111 Pac. 379, rehearing denied, 112 Pac. 402.

An ordinance providing for the employment of a hospital physician and fixing his salary is not repealed by a subsequent ordinance fixing salaries but not mentioning the office of such physician. *Indianapolis v. Martin, Ind.* App. (1909), 89 N. E. 599.

of the original ordinance, does not repeal the latter sections by implication where there is no repugnancy between the section as amended and the others which were left unamended.<sup>97</sup> So an ordinance providing for a city attorney's salary and fees in specified cases, in addition to a percentage on sums of money collected by him for the city provided for in a prior ordinance, does not repeal by implication the prior ordinance.<sup>98</sup>

"To accomplish the repeal of an ordinance there must either be language employed expressly declaring such intention, or there must exist in the subsequent ordinance language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication." *Ex parte Ackerman*, 6 Cal. App. 5, 91 Pac. 429, 431.

The changing of a district to a city with the same boundaries does not repeal an ordinance of the district. An ordinance will remain in force after the adoption of a new charter, authorizing such an ordinance and providing that existing ordinances not conflicting with the charter shall remain in force till repealed. *Ferrell v. Opelika*, 144 Ala. 135, 39 So. 249.

Where an ordinance required the permission of the street commissioner to be obtained before laying gas pipes in the street, and a subsequent ordinance was passed giving a company the right to lay such pipes, such ordinance containing many conditions and restrictions, but not requiring such consent, the latter ordinance was held to repeal the former. *Public Service Corp. v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65.

A special ordinance granting the right to store oil in the city limits to a particular person, was held to be repealed by a subsequent general ordinance applicable to all persons making such storage of oils a criminal offense. *Crowley v. Ellsworth*, 114 La. 308, 38 So. 199, 69 L. R. A. 276.

An ordinance fixing the salary to be paid a city officer, is not repealed by the subsequent adoption of an annual appropriation bill, appropriating a different sum for such salary, notwithstanding an act authorizing the fixing of an amount of salaries by appropriation ordinances. *Joliet v. Petty*, 96 Ill. App. 450.

*Kittanning Borough v. Western Union Tel. Co.*, 26 Pa. Super. Ct. 346, 350.

An ordinance, inconsistent with a state law which was invalid because it failed to clearly express the subject of the act in the title, held not repealed by implication. *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520.

97. *Goldsmith v. Huntsville*, 120 Ala. 182, 188, 24 So. 509.

98. *Austin v. Walton*, 68 Tex. 507, 5 S. W. 70.



Where there are two acts on the same subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.<sup>99</sup>

### § 833. Implied repeals of general and special ordinances.

Implied repeal of a general ordinance by a subsequent conflicting special ordinance follows, where the charter does not forbid.<sup>1</sup> Where a city by its special charter is limited in borrowing money to a sum not exceeding five thousand dollars in any one year, for which it may issue its bonds, but a subsequent general law gives all incorporated cities power to construct water works, without limit as to the cost and to borrow money for such purpose on its bonds, the general law will operate to repeal the

99. *State v. Massey*, 103 N. C. 356, 9 S. E. 632; *Greeley v. Jacksonville*, 17 Fla. 174; *Waller v. Everett*, 52 Mo. 57; *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457.

**Two laws on the same subject.** But where the latter ordinance is not strictly on the same subject, as where successive ordinances providing for the improvement of different streets are passed and the amount appropriated for the purpose is not sufficient to pay for all the work, the last ordinance passed will not be held to repeal the former by implication, and authorize the improvement of the street specified in the last ordinance. *Smyrk v. Sharp*, 82 Md. 97, 33 Atl. 411.

To the extent of the conflict an existing ordinance is repealed, by implication, where a new ordinance contains a provision plainly repugnant to it. *In re Wolf*, 14

Neb. 24, 14 N. W. 660; *Burlington v. Estlow*, 43 N. J. L. 13; *Greeley v. Jacksonville*, 17 Fla. 174.

And this will follow although the two ordinances appear under different headings in the ordinance book. *Cook & Rathborne Co. v. Sanitary Dist.*, 177 Ill. 599, 52 N. E. 870.

Where two statutes are repugnant, the latter repeals the former to the extent of the inconsistency. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461.

Where two grants of power by the legislature are repugnant, the last expressed will must control. *Korah v. Ottawa*, 32 Ill. 121; *Culver v. Third National Bank of Chicago*, 64 Ill. 528.

1. *Brown v. Atlantic Ry. and Power Co.*, 113 Ga. 462, 39 S. E. 71; *Budd v. Camden Horse R. Co.*, 63 N. J. Eq. 804, 48 Atl. 1028.

provision in the charter only in respect to indebtedness and borrowing of money for constructing and maintaining a system of water works, leaving the limitations in the charter in force as to the contracting of indebtedness for other purposes.<sup>2</sup>

A general ordinance which prescribed the width of sidewalks in avenues of a certain width, was held in New Jersey to be repealed by a subsequent special ordinance making a different disposition of a particular avenue.<sup>3</sup>

However, a general ordinance relating to general municipal elections, which provided for the appointment of judges and clerks two weeks before an election, was held in Missouri not to invalidate a special ordinance passed a week before a special local option election, designating the judges and clerks thereof.<sup>4</sup>

If the charter prescribes that no special or general ordinance, which is in conflict or inconsistent with general ordinances of prior date, shall be valid or effectual until such prior ordinance, or the conflicting parts thereof, are repealed by express terms in the repealing ordinance, it would seem that provision should be observed.<sup>5</sup> Hence, a general ordinance, imposing a license of one hundred dollars, and not in express terms repealing a general prior ordinance, imposing a license of fifty dollars, is, under such provision, invalid.<sup>6</sup> Such pro-

2. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461.

A statute which is general does not repeal a former one that is particular. *Haywood v. Savannah*, 12 Ga. 404.

A general statute without negative words, cannot repeal a previous statute which is particular, even though the provisions of one be different from the other, unless the two are irreconcilably inconsistent. *Brown v. Commissioners*, 21 Pa. St. 37, 43; *Providence v. Union Ry. Co.*, 12 R. I. 473; *Con-*

*ley v. Sup'rs Calhoun Co.*, 2 W. Va. 416.

3. *Budd v. Camden Horse R. Co.*, 63 N. J. Eq. 804, 52 Atl. 1130, 54 Atl. 1028, 61 N. J. Eq. 543, 48 Atl. 1028.

4. *O'Laughlin v. Kirkwood*, 107 Mo. App 302, 317, 81 S. W. 512.

5. *St. Louis Charter*, art. III, § 28, *The Municipal Code of St. Louis* (McQuillin), p. 224; *The Revised Code of St. Louis* (1907, Woerner), p. 339; *Lemoine v. St. Louis*, 72 Mo. 404, 406.

6. *St. Louis v. Sanguinet*, 49 Mo. 581.

vision has no application where both ordinances are special. Hence, a special ordinance may, by implication, be repealed by the effect of a subsequent special ordinance in conflict with it.<sup>7</sup>

Notwithstanding explicit charter language to the effect that all general ordinances shall be repealed by express terms, it has been held in Missouri that the provision of a special ordinance, granting a franchise to construct and operate a street railroad, as to rate of speed of cars, supersedes a general ordinance on the same subject.<sup>8</sup> However, the position taken by the court is that the later special ordinance is not an attempt to repeal the prior general ordinance by implication, but it *merely makes an exception to the operation of the former* and leaves it in full force as a general rule. Later the same court remarked: "That is a correct construction of the ordinance and of the charter provision."<sup>9</sup>

### § 834. Effect of repeal—revival.

It is a general rule of law that the repeal of a repealing act restores the law as it was before the passage

7. *Schumacher v. St. Louis*, 3 Mo. App. 297; *St. Louis v. Weitzel*, 130 Mo. 600, 616, 617, 31 S. W. 1045, rules that a particular ordinance relating to garbage was not in conflict with prior ordinances on the same subject, not repealed by express terms.

8. *Ruschenberg v. Southern Electric R. R. Co.*, 161 Mo. 70, 61 S. W. 626.

9. *Campbell v. St. Louis & Sub. Ry. Co.*, 175 Mo. 161, 176, 177, 75 S. W. 86; *St. Louis Charter*, art. III, § 28; *The Revised Code of St. Louis* (1907, Woerner), p. 339.

Judicial limitation of operation of ordinances, see § 662 *ante*.

**Conflicting general and special ordinances.** Where there are two charter provisions, or two ordinances, both on the same subject, one of which is special and particular, and the other general so that if standing alone it would cover the same subject, and would conflict with the special act, the special act controls the general. *St. Louis v. Kaime*, 180 Mo. 309, 318, 79 S. W. 140; *Ruschenberg v. Southern Electric R. R. Co.*, 161 Mo. 70, 82, 61 S. W. 626; *State v. Butler*, 178 Mo. 272, 302, 77 S. W. 560; *Campbell v. St. L. & S. Ry. Co.*, 175 Mo. 161, 176-177, 75 S. W. 86; *Jaicks v. Merrill*, 201 Mo. 91, 98 S. W. 1 c. 757.

of the latter act, without formal words for that purpose, unless otherwise provided either in the repealing act or by some general statute.<sup>10</sup> This rule has been modified by statutes in many states which provide that, in the

10. *Dakota*. *People v. Wintermute*, 1 Dak. 63.

*Georgia*. *Harrison v. Walker*, 1 Ga. 32.

*Indiana*. *Doe v. Naylor*, 2 Black. (Ind.) 32.

*Massachusetts*. *Commonwealth v. Mott*, 21 Pick. (Mass.) 492; *Commonwealth v. Getchell*, 16 Pick. (Mass.) 452.

*New Jersey*. *James v. Dubois*, 16 N. J. L. 285.

*New York*. *People v. Davis*, 61 Barb. (N. Y.) 456; *Gale v. Mead*, 4 Hill (N. Y.) 109.

*North Carolina*. *Brinkley v. Swicegood*, 65 N. C. 626; *State v. Kent*, 65 N. C. 311.

*United States*. *United States v. Philbrick*, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559.

**Revival by repeal—common law rule.** Where an act or rule of the common law is repealed, and the repealing enactment is afterwards expressly or impliedly repealed by another, which manifests no intention that the first shall continue repealed, the rule at common law was that the repeal of the second act revived the first, and, moreover, repealed it *ab initio*, and not merely from the time of the passage of the revived act. This rule still prevails where unchanged by statute.

The doctrine that the repeal of a repealing statute revives the original act does not apply to special acts like a charter of in-

corporation. *Burke v. State*, 5 Lea (Tenn.) 349; *Smith v. Hoyt*, 14 Wis. 252; *State ex rel. v. Reads*, 76 Minn. 69, 78 N. W. 883.

Where a municipal ordinance is repealed and subsequently the repealing ordinance is repealed the original ordinance continues in force. *New York v. Broadway and Seventh Ave.*, 97 N. Y. 275; *In re Opening of Albany St.*, 6 Abb. Pr. (N. Y.) 273.

And this is so where the repeal was only by implication. *People v. Davis*, 61 Barb. (N. Y.) 456, 468; *Van Denburgh v. Greenbush*, 66 N. Y. 1, 4; *Churchill v. Marsh*, 2 Abb. Pr. (N. Y.) 219, 225; *Wheeler v. Roberts*, 7 Cow. (N. Y.) 536; *Hastings v. Aiken*, 1 Gray (Mass.) 163; *Com. v. Churchill*, 2 Met. (Mass.) 118, 122, per Shaw, C. J., explaining *Com. v. Cooley*, 10 Pick. (Mass.) 37, and *Com. v. Marshall*, 11 Pick. (Mass.) 350.

The revival only takes place from the latter date and gives the ordinance no retroactive force. *Rutherford v. Swink*, 96 Tenn. 564, 35 S. W. 554.

An amended ordinance which is invalid cannot have the effect to repeal ordinances which conflict only with the void provision of the amended ordinance. *Portland v. Schmidt*, 13 Ore. 17, 6 Pac. 221; *Harbeck v. New York*, 10 Bosw. (N. Y.) 366.

absence of an express declaration to the contrary, the repeal of a repealing law shall not revive the original act.<sup>11</sup>

The rule has been declared by the Supreme Court of California that a special provision of the legislature, applicable to a certain city only, excepts the city from the effects of the general law upon the same subject, to the same extent as though it were a part of the general law, and when the provision creating the exception is repealed, the operation of the general law is broadened to that extent.<sup>12</sup> Thus when the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city.<sup>13</sup> But this rule has been denied in Missouri,

11. R. S. of Missouri 1909, § 8060; *Pembroke v. Huston*, 180 Mo. 627, 641, 79 S. W. 470; *State v. Slaughter*, 70 Mo. 484; *Hindman v. Springfield*, 80 Mo. App. 579, 583; *United States v. Philbrick*, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559; *Sullivan v. People*, 15 Ill. 233; *Teter v. Clayton*, 71 Ind. 237; *Cassell v. Lexington, H. & P. Turnpike Rd. Co.*, 10 Ky. L. Rep. 486, 9 S. W. 502; *Witkouski v. Witkouski*, 16 La. Ann. 232; *Smith v. Hoyt*, 14 Wis. 252; *Goodno v. Oshkosh*, 31 Wis. 127.

**Repeal as a revival.** The repeal of a statute does not operate a revival of the common law. *State v. Slaughter*, 70 Mo. 484.

The ordinances of the City of St. Louis provide that the repeal of the repealing ordinance does not revive the original ordinance. *Mun. Code of St. Louis*, §§ 1323 and 1333.

Secs. 19 and 20, p. 502, of *Wagner's Statutes of Mo.*, designed for the suppression, not regula-

tion, of prostitution, was repealed as to St. Louis by the charter of the City of St. Louis of 1870, and the repeal of this charter provision, in 1874, did not revive these sections. *State v. Lewis*, 5 Mo. App. 465.

"If the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a reaffirmance of the former law, which it does not, in legal contemplation, repeal." *Bishop on Statutory Crimes*, § 181; *State v. Massey*, 103 N. C. 356, 9 S. E. 632; *State v. Sutton*, 100 N. C. 474, 6 S. E. 687.

12. *Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562.

13. *Heinssen v. State*, 14 Col. 228, 23 Pac. 995, declining to follow *State v. De Bar*, 58 Mo. 395.

This case approves Judge Dillon's conclusion that the decision of the *De Bar* case is erroneous. 1 *Dillon, Munic. Corp.* (5th Ed.), § 236, n. 1.

where it is held that, while a charter amendment authorizing the corporation to "regulate or suppress" bawdy houses operated as a repeal within the city of a general law which prohibited the keeping of such houses, a subsequent charter amendment which repealed the former amendment did not thereby revive the general statute in the city.<sup>14</sup>

An offense committed while the statute creating it is in force is not affected by the repeal of such statute, but the offender may be tried and punished in all respects as if the statute had remained in full force.<sup>15</sup> Thus the court continues to have jurisdiction over one charged on information with a misdemeanor, notwithstanding that the act authorizing such proceeding is repealed pending the trial.<sup>16</sup>

Although the amending act by its terms repeals all parts of former acts inconsistent with its provisions, it will not have the effect of repealing the section of a prior act where the latter section is unconstitutional.<sup>17</sup> Where the repealing clause of an unconstitutional act is made applicable only to laws inconsistent with its operative provisions, then the former law is not repealed.<sup>18</sup>

The repeal of a statute which is in the nature of a contract or a grant of power will not divest interest acquired, or annul acts done under it.<sup>19</sup>

14. *State v. De Bar*, 58 Mo. 395.

15. *State v. Proctor*, 90 Mo. 334, 2 S. W. 472; *State v. Boogher*, 71 Mo. 631; *State ex rel. v. Willis*, 66 Mo. 131.

16. *State v. Ross*, 49 Mo. 416. But see next succeeding § 835, *post*.

17. *Copeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281; *State ex rel. v. County Court*, 11 Wis. 50; *Tims v. State*, 26 Ala. 165; *Childs v. Shower*, 18 Iowa 261, 272.

18. *Devoy v. New York*, 36 N.

Y. 449; *Stephens v. Ballou*, 27 Kan. 594.

19. *James v. DuBois*, 16 N. J. L. 285.

See §§ 759 *et seq.*, 826, 827 *ante*.

"It cannot be drawn in question as a general proposition, that the repeal of a statute, by virtue of which a by-law has been enacted, involves also the repeal of the by-law itself, which is but a branch or an emanation from it. Whatever reason may be supposed to exist for the repeal of the statute, must also exist against the fur-

### § 835. Same—penal ordinances.

It is generally held that the repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in the repealing ordinance.<sup>20</sup> In other words, the repeal of an ordinance under which a penalty has been incurred has the same effect given it as by the common law, and operates as a pardon of the offense, superseding the jurisdiction of the court in any suit pending to enforce such penalty.<sup>21</sup> Statutes providing that a pending prosecution is not abated by the repeal of the statute on which it is founded have been held to have no application to municipal ordinances unless expressly made so.<sup>22</sup> But a contrary rule

ther duration of the by-law, which it was the special and sole object of the statute to bring into being and to sustain by legislative authority." Per Gilchrist, J., in *Lisbon v. Clark*, 18 N. H. 234, 239.

20. *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Ball v. Tolman*, 135 Cal. 375, 67 Pac. 339; *State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Spears v. Modoc County*, 101 Cal. 303, 35 Pac. 869; *Kansas City v. White*, 69 Mo. 26; *Kansas City v. Clark*, 68 Mo. 588; *Earnhart v. Lebanon*, 5 Ohio Cir. Ct. 578; *United States v. Tynen*, 11 Wall. (U. S.) 88, 20 L. Ed. 153; *Naylor v. Galesburg*, 56 Ill. 285, 287; *Illinois & M. Canal Co. v. Chicago*, 14 Ill. 334.

*Examine State v. Procter*, 90 Mo. 334, 2 S. W. 472; *State v. Boogher*, 71 Mo. 631; *State v. Willis*, 66 Mo. 131; *State v. Ross*, 49 Mo. 416; *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520; *Kansas City v. Summerwel*, 58 Mo. App. 246;

*Wichita v. Murphy*, 78 Kan. 859, 99 Pac. 272; *Portland v. Cook*, 48 Ore. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733.

21. *Rutherford v. Swink*, 96 Tenn. 564, 35 S. W. 554; *Sutherland*, Stat. Const., §§ 162, 163; *Endlich*, Interp. Stat., § 478 and note.

22. *Barton v. Gadsden*, 79 Ala. 495; *Rutherford v. Swink*, 96 Tenn. 564, 35 S. W. 554.

**Repeal of state laws**, by express statute, do not usually affect prosecutions thereunder. *R. S. Mo.* 1909, § 8064; *State v. Ross*, 49 Mo. 416; *State ex rel. v. Vernon County*, 53 Mo. 128; *Rogers v. Pacific R. Co.*, 35 Mo. 153; *Bell v. McCoy*, 136 Mo. 552; *Webster County v. Cunningham*, 101 Mo. 642; *Wolff v. Wohlien*, 32 Mo. 125; *Minter v. Bradstreet*, 174 Mo. 444, 490, 73 S. W. 668; *Aultman v. Daggs*, 50 Mo. App. 280; *Young v. Kansas City, St. J. & C. B. Ry. Co.*, 33 Mo. App. 509; *Dougherty v. Downey*, 1 Mo. 674.

has been announced in Kansas<sup>23</sup> and Kentucky.<sup>24</sup> The repeal of the repealing ordinance does not operate to restore the right to prosecute for past violations; neither does the enacting of an ordinance to the effect that the first shall not affect prosecutions for prior violations.<sup>25</sup>

### § 836. Same—improvement ordinances.

The repeal of an ordinance for opening and improving a proposed street destroys all authority for proceeding with the improvement.<sup>26</sup> But the repeal of an ordinance for a special assessment for constructing and laying water supply pipes, pending an appeal from a judgment confirming the assessment, does not justify the court in vacating the judgment after several terms of court have passed.<sup>27</sup>

### § 837. Effect of repeal and re-enactment.

Where a statute repealed is re-enacted in the same words by an act which takes effect at the same time as the repealing act, it is continued in uninterrupted operation.<sup>28</sup> The rule of construction applicable to acts which

23. *Denning v. Yount*, 62 Kan. 217, affirming 9 Kan. App. 708, 61 Pac. 803.

24. The Kentucky statute, providing that no new law shall be construed to repeal a former law as to any offense committed or penalty incurred thereunder except that any provision mitigating a penalty may be applied to a judgment pronounced after the new law takes effect, applies to ordinances as well as to general laws. *Baker v. Lexington*, 21 Ky. L. Rep. 809, 53 S. W. 16.

25. *Day v. Clinton*, 6 Ill. App. 476.

26. *Kaime v. Harty*, 4 Mo. App. 357.

27. *McChesney v. Chicago*, 161 Ill. 110, 43 N. E. 702; *People v. McWethy*, 165 Ill. 222, 46 N. E. 187.

As to repeal by implication in particular case. *Smyrk v. Sharp*, 82 Md. 97, 33 Atl. 411.

See §§ 824, 828 *ante*.

28. *Connecticut*. *State v. Baldwin*, 45 Conn. 134, 139.

*Nebraska*. *State v. Wish*, 15 Neb. 448, 19 N. W. 686.

*New Jersey*. *Middleton v. N. J. West Line Ry. Co.*, 26 N. J. Eq. 269.

*North Carolina*. *Kesler v. Smith*, 66 N. C. 154.

*Wisconsin*. *State v. Gumber*, 37 Wis. 298; *Fullerton v. Spring*, 3



revise and consolidate another act or acts is, that when the revised and consolidated act re-enacts in the same words the provisions of the act or acts so revised and consolidated, such revision and consolidation shall be taken to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act.<sup>29</sup> The repeal of a general corporation law, where the manifest purpose of the repealing act is to substitute a new law extending the provisions of the old, cannot be construed in the absence of express provisions, as intended to repeal the charters of corporations formed under it.<sup>30</sup> A repealing statute, without a saving clause, which substantially re-enacts the law repealed, will not affect pending suits.<sup>31</sup>

### § 838. Effect of revision of ordinances as to repeal.

When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made.<sup>32</sup>

Wis. 667; *Laude v. Chicago & N. W. Ry. Co.*, 33 Wis. 640; *Hurley v. Texas*, 20 Wis. 634; *Glentz v. State*, 38 Wis. 549.

29. *Scheffels v. Tabert*, 46 Wis. 439, 446, 1 N. W. 156.

The re-enactment of a former section of a statute in a later section, is not necessarily a repeal of the former section. *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1.

30. *United Hebrew Assn. v. Ben-shimol*, 130 Mass. 325.

The same has been held to be true of the repeal and re-enactment of laws, which authorize towns to exercise a municipal

power. *Lisbon v. Clark*, 18 N. H. 234.

31. *Alexander v. Big Rapids*, 70 Mich. 224, 38 N. W. 227; *Moore v. Kenockee*, 75 Mich. 332, 42 N. W. 944; *Merkle v. Bennington*, 68 Mich. 133, 35 N. W. 846.

32. *St. Louis v. Foster*, 52 Mo. 513; *St. Louis v. Alexander*, 23 Mo. 483, 509; *Dart v. Bagley*, 110 Mo. 42, 19 S. W. 311; *Atty. Gen. v. Heidorn*, 74 Mo. 410; *State ex rel. v. Ranson*, 73 Mo. 78, 93; *Kamerick v. Castleman*, 21 Mo. App. 587; *Providence v. Union R. Co.*, 12 R. I. 473; *State v. Pollard*, 6 R. I. 290.

A statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate as a repeal of the former statute, although it contain no express words to that effect.<sup>33</sup> If a statute is revised and parts of it are omitted in the revision, those provisions are not to be revived by construction.<sup>34</sup>

Where a revised ordinance repealed "all ordinances and parts of ordinances of a general nature not herein contained," and provided for summary trial of violators

**Revision continues operation of laws.** The general ordinances of a city were revised and consolidated for publication in book form, and were thus adopted and re-enacted. An ordinance under which a prosecution had been begun was re-enacted in substantially the same language, without any words of repeal, or any clause saving pending prosecutions. It was held that the effect of the re-enactment was to continue uninterruptedly in force the provisions of the original ordinance, and that the pending prosecution was not abated. *Junction City v. Webb*, 44 Kan. 71, 23 Pac. 1073.

A statute requiring that ordinances of cities of the second class should be revised by the general council within one year from the time the charter took effect, a revision made after that time was held valid. *Lowry v. City of Lexington*, 24 Ky. L. Rep. 516, 68 S. W. 1109.

33. *Giddings v. Cox*, 31 Vt. 607; *Murdock v. Memphis*, 20 Wall. (U. S.) 590, 617, 22 L. Ed. 429, affirming 7 Coldw. (Tenn.) 483.

See § 829 *ante*.

**Revision as new enactment.** Where it is apparent that the legislature intended to revise a statute, the former statutes upon the subject, so far as in conflict with the last are no longer in force, though not expressly repealed. *Wakefield v. Phelps*, 37 N. H. 295, 304.

Where a town adopted a subsequent ordinance revising the whole subject of selling or dealing in spirituous liquors, it must be taken as a substitute for all prior ordinances on the same subject, although the last contained no words of repeal. *Booth v. Carthage*, 67 Ill. 102.

34. *Pingree v. Snell*, 42 Me. 53; *State v. Wilson*, 43 N. H. 415; *Ellis v. Paige*, 1 Pick. (Mass.) 43, 45.

**Revision as a repeal.** When an amendatory act of the legislature reads that a certain section of a previous act shall thereafter read as follows, any provision of the previous act which is not found in the amendatory act is repealed. *Blakemore v. Dolan*, 50 Ind. 194; *State v. Andrews*, 20 Tex. 230.

of ordinances, it was held that it repealed a prior ordinance authorizing jury trials.<sup>35</sup>

A statute authorized cities to cause their ordinances to be published, and provided that such publication should be received as evidence of the passage and publication of such ordinances as of the dates therein mentioned, without further proof. A compilation made in pursuance of such statute was held not to effect a repeal of the ordinances as they existed at the time of the compilation.<sup>36</sup>

### § 839. Repeal of ordinance by ordinance only.

An ordinance can be repealed only by ordinance, and not by resolution or order or motion of the legislative or governing body, not passed and published with the same formality of an ordinance.<sup>37</sup>

35. There was positive conflict. *Delaney v. Kansas City Police Court*, 167 Mo. 667, 67 S. W. 589.

36. *Gallaher v. Jefferson*, 125 Iowa 324, 101 N. W. 124.

**Effect of change in particular cases.** *Jefferson City v. Edwards*, 37 Mo. App. 617; *Kansas City v. Summerwell*, 58 Mo. App. 246; *Taylor v. Hoya*, 9 Tex. Civ. App. 312, 29 S. W. 540.

In *State ex rel. v. Mobile*, 24 Ala. 701, a case where there was no express repeal, it is said: "Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name."

37. *Illinois*. *Backhaus v. People*, 87 Ill. App. 173; *Galt v. Chicago*, 174 Ill. 605, 51 N. E. 653; *Joliet v. Petty*, 96 Ill. App. 450; *Hibbard v. Chicago*, 173 Ill. 91, 50 N. E. 256; *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *Hope v. Alton*, 116 Ill. App. 116, affirmed in 73 N. E. 406, 214 Ill. 102; *Hearst's Chicago American v. Spies*, 117 Ill. App. 436; *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

*Indiana*. *Chicago, I. & L. Ry. Co. v. Salem*, 166 Ind. 703, 76 N. E. 631; *Chicago, etc. R. Co. v. Salem*, 166 Ind. 71, 76 N. E. 631; *State v. Swindell*, 146 Ind. 527, 45 N. E. 700, 58 Am. St. Rep. 375.

*Iowa*. *Ryce v. Osage*, 88 Iowa 558, 55 N. W. 532; *Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333.

*South Dakota*. *Mitchell v. Dakota Central Tel. Co.* (S. Dak., 1910), 127 N. W. 582.

**§ 840. When ordinances and charter provisions are superseded by charter amendment.**

In general, alterations in the charter do not affect existing ordinances, or by-laws, resolutions or other corporate rights and liabilities.<sup>38</sup> But as stated elsewhere a municipal corporation does not lose its identity or become relieved of its liabilities by any change of its charter or by the substitution of a new charter in place of the old, unless there is an express legislative declaration to that effect.<sup>39</sup> So a mere revision of a charter, as in the revision of ordinances has not the effect of breaking the continuity of those provisions which were in force before it was made. This point is treated in a prior section.<sup>40</sup> Notwithstanding charter changes all ordinances and resolutions remain in force unless they

**Ordinance can be repealed only by ordinance.** "No ordinance shall be repealed except by ordinance." Charter San Francisco, art. II, ch. 1, § 18; St. & Amend. to Codes of Cal., p. 246.

An ordinance cannot be repealed by mere verbal motion to that effect without reference to the title, number or date of passage of the ordinance to be repealed. *Swindell v. State*, 143 Ind. 153, 35 L. R. A. 50, 42 N. E. 528.

An ordinance cannot be suspended by resolution. *People ex rel. v. Mount*, 186 Ill. 560, 578, 579, 58 N. E. 360; *Terre Haute v. Lake*, 43 Ind. 481; *Chicago & N. P. Ry. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596.

A resolution provided that a particular ordinance theretofore duly enacted "be reconsidered" is not a repeal of such ordinance. *Ashton v. Rochester*, 60 Hun (N. Y.) 372, 14 N. Y. S. 855.

A resolution rescinding a for-

mer resolution conditionally only is inoperative. *Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443.

Invalid ordinance cannot repeal another ordinance. *Ensley v. State*, 172 Ind. 198, 88 N. E. 62.

38. The repeal of a municipal charter and the adoption of a new one does not relieve the city from its obligations and liabilities. *Lake Charles, etc. Ice Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

39. *Bates v. Gregory*, 89 Cal. 387; *Watts v. Port Deposit*, 46 Md. 500.

Effect is to supersede old charter, and officers elected under it become the legal officers of the city. *People v. Bagley*, 85 Cal. 343, 24 Pac. 716.

An amendment of the charter by the legislature may relieve the city of an obligation created by statute from the city to the state. *Commonwealth v. Louisville*, 44 Ky. (5 B. Mon.) 293.

40. § 838 *ante*.

conflict and are inconsistent with the charter provisions as revised or amended.<sup>41</sup> But a new charter, or amendment of the old, has the effect of repealing inconsistent charter and ordinance provisions.<sup>42</sup> Thus a description

41. *Alabama*. Baader v. Cullman, 115 Ala. 539, 22 So. 19.

*Florida*. Pensacola v. Sullivan, 23 Fla. 1, 6 So. 922.

*Indiana*. Chamberlain v. Evansville, 77 Ind. 542.

*Iowa*. Ex parte Strohl, 16 Iowa 369.

*Maryland*. United Railway & E. Co. v. Hayes, 92 Md. 490, 48 Atl. 364.

*Michigan*. Ruell v. Alpena, 108 Mich. 290, 66 N. W. 49.

*Missouri*. County Court v. Griswold, 58 Mo. 175, 199; Monett v. Beaty, 79 Mo. App. 315.

*Pennsylvania*. Erie Academy v. Erie, 31 Pa. St. 515.

*Texas*. Garey v. Galveston, 42 Tex. 627.

*Washington*. Spokane v. Williams, 6 Wash. 376, 33 Pac. 973.

**Effect of change of charter—illustrations.** An amendment of the charter by the legislature may relieve the city of an obligation created by statute from the city to the state. *Com. v. Louisville*, 5 B. Mon. (Ky.) 293.

A statute expressly repealed under which an ordinance is passed, and substituting therefor a statute containing similar provisions does not affect the ordinance if not repugnant to the new statutory provisions. *Allen v. Davenport*, 107 Iowa 90, 95, 77 N. W. 532.

And so where an ordinance providing for the issuing of license to sell liquors and for the punish-

ment of all persons who should sell without license, where the charter was amended so as to prohibit cities of the second class from issuing license for the sale of liquors, the remaining part of the ordinance was held to be in force. *Franklin v. Westfall*, 27 Kan. 614.

Where a state statute provided that judges of an election should receive no pay and repealed all existing ordinances inconsistent with its provisions it was held that an ordinance then in force providing for the pay of judges and clerks of elections was repealed only so far as it related to the judges, and clerks were entitled to pay at the rate fixed by the ordinance. *Quienette v. St. Louis*, 76 Mo. 402, 8 Mo. App. 583.

Where law creating the territory into a school district remains in force after adoption of amended charter, see *Smith v. People*, 154 Ill. 58, 39 N. E. 319.

Adoption of new charter repeals by implication ordinances inconsistent therewith. *Wethington v. Owensboro*, 21 Ky. L. Rep. 960, 53 S. W. 644.

42. *Colorado*. Carpenter v. People, 8 Colo. 116, 5 Pac. 828.

*Indiana*. Wood v. Mears, 12 Ind. 515, 74 Am. Dec. 222.

*Kentucky*. Wethington v. Owensboro, 21 Ky. L. Rep. 960, 53 S. W. 644.

*Louisiana*. New Orleans v. Southern Bank, 15 La. Ann. 89.

of the territory whose inhabitants are incorporated, being an essential part of the charter, is, therefore, superseded by an entirely new charter containing a different description of territory.<sup>43</sup>

The rule applicable to state statutes where the constitution is changed, applies with like force to municipal ordinances and resolutions where the city charter is altered. Where a statute which does not in express terms annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter act does not repeal the former.<sup>44</sup> A change in the organic law under which a city is organized does not repeal existing ordinances while the power to pass the same continues to exist.<sup>45</sup> But if in the revised charter a provision of a prior charter, which authorized an ordinance to permit a party wall to be built partly on the land of an adjoining owner without his consent, was omitted, an ordinance enacted by virtue of such power

*Michigan.* People v. Brill, 120 Mich. 42, 78 N. W. 1013, 6 Det. Leg. N. 53.

*Nebraska.* In re Hall, 10 Neb. 537, 7 N. W. 287.

*New Hampshire.* Lisbon v. Clark, 18 N. H. 234.

*Pennsylvania.* Schroeder v. Lancaster City, 15 Pa. Co. Ct. Rep. 467.

*Rhode Island.* State v. Pollard, 6 R. I. 290.

**Change repeals ordinance, when.** Regulations relating to the auditing and paying claims. State ex rel. v. Smith, 89 Mo. 408.

An ordinance prohibiting the sale of unsound meat, and providing a penalty for its violation becomes inoperative on the taking effect of a charter provision au-

thorizing the council to prevent the selling of such meat, and to punish those who "knowingly" sell it, so far, at least, as the ordinance is broader than the charter. People v. Brill, 120 Mich. 42, 78 N. W. 1013.

But where new charter authorizes such an ordinance and provides that existing ordinances shall remain in force until repealed the ordinance remains in force. Ferrell v. Opelika, 144 Ala. 135, 39 So. 249.

43. People v. Oakland, 92 Cal. 611, 28 Pac. 807.

44. Waring v. Mobile, 24 Ala. 701.

45. In re Hall, 10 Neb. 537, 7 N. W. 287.

and existing at the time of the revision is repealed by the adoption of the revised charter.<sup>46</sup>

### § 841. When charter provisions supersede general laws.

The rule has obtained in some jurisdictions that a municipal charter cannot be amended, even by general, or "genuine general legislation," in matters of purely municipal and local concern, unless such legislation is necessary to carry out an express or implied constitutional provision. "Laws, though general they may be, which relate alone to the government of cities, must yield to the provisions of the adopted charter," as a law providing for "assessing damages and benefits for grading and re-grading naturally falls within the dominion of municipal government." Accordingly, the Supreme Court of Missouri unanimously held that a constitutional charter provision on this subject suspended and took the place of the general law of the state relating to the same matter, in force when the charter was adopted.<sup>47</sup> So a

46. *Schmidt v. Lewis*, 63 N. J. Eq. 565, 52 Atl. 707.

47. *State ex rel. v. Field*, 99 Mo. 352, 12 S. W. 802.

When charter provisions supersede general laws. Subsequently this case was approved in these words: "We think it was properly ruled that the special charter superseded the general statutes where the two conflicted as to a mere municipal regulation, and we hold that the condemnation proceedings to acquire land for streets, parks, waterworks, sewers and the like clearly fall within municipal regulation." *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 472, 41 S. W. 943.

See *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773; *Kansas City v. Ward*, 134 Mo. 172, 35 S.

W. 600; *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

But in *Ewing v. Hoblitzelle*, 85 Mo. 64, at page 77, the court, *arguendo*, says a charter provision as to a board of police commissioners would not have prevailed against a state law in force at the time the St. Louis charter was adopted. This *dictum* thus broadly stated appears to antagonize the principle of the unanimous decision in the Field case, which, briefly stated, is that a charter provision may prevail against a state law on the same subject. But this distinction between the two cases is controlling: The St. Louis charter not only expressly provides "that no system of police shall be estab-

legislative act, empowering cities organized, or which might thereafter be organized under the provisions of the constitution, allowing cities to frame or adopt their own charters, to establish and maintain a system of parks or boulevards, was declared unconstitutional, as an attempt to amend a municipal charter; the court holding that the act related "solely to matters of internal municipal government."<sup>48</sup> So a charter section providing that any appointed municipal officer may be removed by the mayor or council for cause is not repealed by a legislative act providing for removal of any state, county or city officers, guilty of wilful and corrupt neglect of official duty, and for a trial by jury, if demanded.<sup>49</sup>

By Constitution in Minnesota, general laws relating to affairs of cities, applying equally to all cities of a class, "shall be paramount while in force to the provisions relating to the same matter included in the local charter," authorized by the constitution. "But no local charter provision or ordinance passed thereunder shall

lished or maintained other than the present metropolitan system as long as the same is established by law" (Art. III, § 26, par. 2), but the matter of preserving the public peace and order is usually regarded as a proper function of the state, whereas, in the Field case, the subject involved was purely local and municipal.

48. *Kansas City v. Scarritt*, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111.

See § 173 *et seq. ante*.

**General laws supersede charters.** In California it has been held that constitutional charter provisions in conflict with general laws passed after the adoption of the charter will be superseded. *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 711.

Thus a general law relating to street improvements applicable to all the cities of the state, will supersede provisions of freeholder's charters on the same subject. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615.

Compare *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711.

Charter provisions relating to streets inconsistent with provisions of a new or amended constitution are, of course, repealed. *Donahue v. Graham*, 61 Cal. 276.

49. *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. 457; *Man-ker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372.

See § 176 *et seq. ante*.



supersede any general law of the state defining or punishing crimes or misdemeanors.”<sup>50</sup>

In that state it has been held that the provisions of a home rule charter, if subject to municipal regulation, supersede the general laws with reference to the same subject-matter, unless otherwise expressly provided.<sup>51</sup>

A statute authorizing cities of a certain class to license particular things, such as the sale of intoxicating liquors, does not repeal the provisions of the general law on the subject.<sup>52</sup> But if the city, acting under the power given by the general law, licenses the thing, one acting under a license cannot be punished under the general law.<sup>53</sup>

A general law applicable to the entire state will not modify or repeal, in whole or in part, a special act, unless by express words or by necessary implication.<sup>54</sup>

Where the constitution of the state, as in California, contains a provision so as to except municipal affairs from being subject to and controlled by the operation of general laws, cities to which the provision applies are not affected by general laws relating to municipal affairs.<sup>55</sup>

## § 842. Same subject.

While, as we have seen, unless restricted, the legislature may change from time to time the territorial limits

50. Laws of Minn. 1897, pp. 507-509.

51. *Turner v. Snyder*, 101 Minn. 481, 112 N. W. 868.

52. *State v. Young*, 17 Kan. 414.

Where the constitution confers power upon the corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors, they are not limited or restricted to the same penalties imposed by the general

law. *Baldwin v. Murphy*, 82 Ill.

485. But see § 720 *ante*.

53. *Berry v. People*, 36 Ill. 423; *Gardner v. People*, 20 Ill. 430. But see ch. 24 *post*.

54. *State (Gorum) v. Mills*, 24 N. J. L. 177.

55. *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644.

See §§ 215 to 217 *ante*; also ch. 24 *post*.

of a municipal corporation,<sup>56</sup> the rule has been announced in Kansas that the boundaries of a city, fixed by its charter, cannot be changed by special legislative act.<sup>57</sup>

The Supreme Court of Missouri applied this rule to a constitutional or freeholders' charter.<sup>58</sup>

The Supreme Court of Washington has held that the legislature may extend the limits of a city having a freeholders' charter where the boundaries were not fixed in such charter.<sup>59</sup>

An act of the legislature which is not mandatory but merely permissive or enabling in its provisions and which does not conflict with a subsequent charter amendment relating to the same subject (a strictly municipal affair, to establish and maintain a system of parks and boulevards) will not supersede such amendment.<sup>60</sup>

56. § 265 *ante*.

57. *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50; *Wyandotte v. Wood*, 5 Kan. 603.

58. *Westport v. Kansas City*, 103 Mo. 141, 15 S. W. 68. See *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723.

59. *State v. Warner*, 4 Wash. 773, 31 Pac. 25, declining to follow *Westport v. Kansas City*, 103 Mo. 141, 15 S. W. 68, and distinguishing *People v. Oakland*, 92 Cal. 611, 28 Pac. 807.

See § 266 *ante*.

60. *Kansas City v. Bacon*, 147 Mo. 259, 269, 48 S. W. 860.

**Charter provision supersedes.** In a dissenting opinion in this case, *Sherwood, J.*, declares (p. 318) that a charter "may be amended by a general law, and such general law so far as concerns strictly municipal matters may be superseded by an amendment or new charter." It would follow then that in strictly mu-

nicipal matters the city, as to such law, is not "subject to \* \* the laws of the state" (Const. of Mo. IX, § 16), unless it desires to be. It is only "subordinate" in this respect when it fails to nullify such law of the state. The state and the municipality possess equal and concurrent jurisdiction and "the race belongs to the swiftest." To use a quotation of this judge, this doctrine would be indubitably,

"The direful spring

Of woes unnumbered,"

to both the state and the municipalities. If it be conceded that a city possesses the power to vacate a legislative act it is clear that the constitutional provision just quoted is not to be taken literally, but is subject to every provision of the constitution, which in unequivocal terms, prevents legislative interference in "strictly municipal matters." That a charter provision will supersede a

Charter provisions regulating the practice and proceedings in the courts of the state in ordinary common law actions against the city, or against the city and others, which conflict with the general law of the state relating to this subject, are clearly invalid.<sup>61</sup>

Under the statute of Louisiana which confers power upon the people of cities and towns of that state—except New Orleans—by direct vote to amend their municipal charter, it was properly held that such legislation only confers authority to regulate the internal organization and the mode and agencies by which the powers and privileges granted by law may be exercised, and does not empower a city by amendment of its charter to extend its power or alter or destroy the existing authority of the state or parish over their inhabitants. Therefore, an amendment prohibiting the imposition of a parish tax or license upon the inhabitants of the city was declared *ultra vires*. The court observed: “The towns of the state would, indeed, be ‘chartered liberties,’ if, by amending their own charters, they could confer upon themselves indefinite privileges and immunities, and repeal and annul the general laws of the state so far as applicable to them.”<sup>62</sup>

### § 843. When ordinances supersede general laws.

Sometimes ordinances authorized by charter will have the effect of special laws of the legislature and will supersede the general laws within the corporate limits relating to that particular subject.<sup>63</sup> Ordinances passed by a city

general law relating to “strictly municipal matters,” is the settled doctrine in Missouri and is sound. An ordinance will have the same effect. § 843 *post*.

61. *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817.

62. *Tax Collector v. Dendinger*, 38 La. Ann. 261, 263.

See §§ 194, 215 to 217 *ante*.

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63. *Colorado*. *Rogers v. People*, 9 Colo. 450, 12 Pac. 843.

*Illinois*. *McPherson v. Chebanse*, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857; *Covington v. East St. Louis*, 78 Ill. 548.

*Massachusetts*. *In re Goddard*, 16 Pick. (Mass.) 504.

*Minnesota*. *State v. Dwyer*, 21 Minn. 512.

council under a charter giving the city power to pass ordinances inconsistent with and repugnant to the general law, by necessary implication, repeal the general law upon the subject within the territorial limits of the city.<sup>64</sup> The principle is well illustrated in a Vermont case. The charter of a village granted particular powers relating to the licensing of eating houses, which were inconsistent with the general state statutes in force at the time of the granting of the charter. Here the court said: "If the by-law is authorized by the charter it has the effect of a special law of the legislature within the limits of the village and supersedes the general law on the subject of victualing-houses therein; for the charter giving the village power to pass the by-law inconsistent with and repugnant to the general law operated to repeal the general law within the territorial limits of the village on the principle that provisions of different statutes which are in conflict with one another cannot stand together; and in the absence of anything showing a different intent on the part of the legislature, general legislation upon a particular subject must give way to later inconsistent special legislation upon the same subject."<sup>65</sup> The Supreme Court of Louisiana invoked the same doctrine in holding that the provision of a municipal charter which conferred power to pass and enforce ordinances to suppress and punish the sale of adulterated drinks was not superseded by a general statute providing for the prosecution of the same offense throughout the state.<sup>66</sup>

*Missouri.* State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

*New Jersey.* State v. Clarke, 25 N. J. L. 54; State v. Morristown, 33 N. J. L. 57.

*New York.* Mark v. State, 97 N. Y. 572.

*Vermont.* In re Snell, 58 Vt. 207, 1 Atl. 566.

*United States.* Daviess v. Fairbairn, 3 How. (44 U. S.) 636.

64. Bennett v. People, 30 Ill. 389; Des Moines Gas Co. v. Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

65. St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571.

66. State v. Labatut, 39 La. Ann. 513, 2 So. 550.

Ordinarily, if the charter does not confer upon the city authorities exclusive jurisdiction over the subject, ordinances passed by the city do not supersede the general law.<sup>67</sup>

As pointed out,<sup>68</sup> if a later general law and a prior special law, or ordinance do not conflict, they both stand;<sup>69</sup> but if the two acts are irreconcilably inconsistent, or it appears that the legislature intended that the later act should supersede the earlier act, the former is repealed by implication.<sup>70</sup>

Where an amendatory act covers the subject of the qualifications of an officer, as mayor, in like manner as the original charter, but omits a proviso relating to certain disqualifications, it will be held that the proviso stands as part of the revised charter, as it did not conflict with the corresponding provision contained therein.<sup>71</sup>

67. *Berry v. People*, 36 Ill. 423; *Seibold v. People*, 86 Ill. 33.

See ch. 24 *post*.

Ordinances do not supersede general laws, when. A by-law which a borough was authorized to make by its charter, which prohibited the taking of oysters from the water within said borough, during a certain period of the year, is abrogated by a general law of the state passed subsequent to the granting of the charter, prohibiting the doing of the same acts. *Southport v. Ogden*, 23 Conn. 128.

The passage of an ordinance by the city of Lexington, authorizing a fine of \$100 for a breach of the peace, did not repeal the general law, which authorizes a fine at the discretion of the jury by the authority of the city court. *Marsh v. Commonwealth*, 12 B. Mon. (Ky.) 25.

68. § 829 *ante*.

69. As to right of both city and state to license or tax the same subject or object: *Ferries. Harrison v. State*, 9 Mo. 530. *Auctioneers. Haywood v. Savannah*, 12 Ga. 404.

70. § 831 *ante*.

71. The court said that the point that the proviso was repealed might perhaps have been more successfully urged had it not been expressly provided in the amendatory act, "that all such parts of the act to which this is a supplement as are contrary to, or inconsistent with the provisions of this act, be and the same are hereby repealed." *State v. Merry*, 3 Mo. 278, 280.

The contrary rule is intimated in *Goodenow v. Buttrick*, 7 Mass. 140, 143.

So a charter section which provides that all claims for damages against the city must be presented at the city council and filed with the clerk within six months after the time when such claims for damages accrued does not contravene the statute of limitations which allows three years within which to bring such actions, because the limitation of an action and a provision in a charter for the manner or time for presenting a claim are two entirely different propositions and are in no wise conflicting, provided the time allowed for presenting the claim is within the statute of limitations.<sup>72</sup> Of course, the power granted by the charter to pass an ordinance which will supersede a state statute may be subsequently revoked by the legislature.<sup>73</sup>

As we have seen, authorized ordinances have the same force and effect within the corporate limits that acts of the legislature have on the people throughout the state. It therefore follows that whether an ordinance is in apparent or real conflict with a general law, or whether it will supersede such law, must be determined by the same principles applicable to charter provisions.<sup>74</sup>

72. *Scurry v. Seattle*, 8 Wash. 278, 280, 36 Pac. 145.

73. *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, 6 L. R. A. 751; *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; *St. Louis v. Cafferata*, 24 Mo. 94; *St. Louis v. Bentz*, 11 Mo. 61; *Mobile v. Allaire*, 14 Ala. 400; *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577.

*St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *Hopkins v. Mayor*, 4 M. & W. 621; *Taylor v. Carondelet*, 22 Mo. 105; *State ex rel. v. Walbridge*, 119 Mo. 383, 394, 24 S. W. 457; *Union Depot Ry. Co. v. Southern R. R. Co.*, 105 Mo. 562, 575, 16 S. W. 920; *Jackson v.*

*Grand Av. Ry. Co.*, 118 Mo. 199, 218, 24 S. W. 192; *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 481, 17 Sup. Ct. 161, 41 L. Ed. 518; *Buttrick v. Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721; *Brick Pres. Church v. New York*, 5 Cowen (N. Y.) 538, 541.

§ 643 *ante*.

74. *State v. Binder*, 38 Mo. 451, held that a city ordinance, passed pursuant to authority conferred upon the city, operated as a repeal of a general state law.

*State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471, holds that the power given *St. Louis* under the Charter of 1870, art. III, § 1, "to regulate bawdy houses," operated as

§ 844. Effect on ordinances by surrender of special charter—change in class or grade.

As pointed out elsewhere, unless otherwise provided by statute, when a city surrenders its special charter and elects to be governed by the general incorporation laws applicable, or advances to a higher class, or is reduced to a lower municipal grade, all its rights, liabilities, property, suits, etc., remain unaffected by the change. All rights and property vested in the former organization become vested in the new. While the adoption of the general incorporation law by a city organized under special charter repeals all inconsistent provisions of such charter, consistent provisions continue in force. All ordinances and resolutions in force remain so, until altered or repealed, unless inconsistent with the law applicable to the new organization.<sup>75</sup>

Likewise, as we have seen, on change of class or grade, all ordinances continue in force unless inconsistent with

a repeal of the general statute prohibiting them, in respect to the City of St. Louis (See *Ex parte Garza*, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845).

*State v. De Bar*, 58 Mo. 395, affirms this case and grounds judgment on the principle that where a special provision applicable to a particular object or locality is inconsistent with the general law, the former must prevail. And this rule applies to a comparison of duly authorized ordinances with state statutes, since both are from a common source of authority.

Where the matter is committed by state statute to the exclusive jurisdiction of the municipality—as to license, tax, restrain, prohibit the selling of intoxicating liquor, etc.—such express grant of power will be construed to super-

sede prior state laws conferring jurisdiction on the state over the subject. *Huffsmith v. People*, 8 Colo. 175, 6 Pac. 157.

The rule is illustrated in numerous decisions. *Smith v. Madison*, 7 Ind. 86; *Burlington v. Lawrence*, 42 Iowa 681; *In re Goddard*, 16 Pick. (Mass.) 504; *St. Louis v. Alexander*, 23 Mo. 483; *St. Louis v. Cafferata*, 24 Mo. 94; *St. Louis v. Bentz*, 11 Mo. 61; *Baldwin v. Green*, 10 Mo. 410; *Harrison v. State*, 9 Mo. 530; *State v. Simonds*, 3 Mo. 414; *State v. Payne*, 4 Mo. 377; *State v. Cowan*, 29 Mo. 330; *Westport v. Kansas City*, 103 Mo. 141, 15 S. W. 68; *State v. Morristown*, 33 N. J. L. 57; *State v. Clarke*, 25 N. J. L. 54; *Mark v. State*, 97 N. Y. 572.

75. § 130 *ante*.

the powers relating to the class or grade which the city enters, until amended or repealed. Thus a statute converting a borough into a city does not, of itself, and in the absence of express provisions to that effect annul existing ordinances.<sup>76</sup>

### § 845. Effect on ordinances on dissolution and reorganization.

As mentioned elsewhere on dissolution and reorganization of a municipal corporation when the new becomes the successor of the old, the effect is to continue in existence all ordinances and franchises which constitute contracts and under which rights have become vested.<sup>77</sup>

#### 76. § 132 *ante*.

Passing from one class to another, ordinances remain the same. *Ritchie v. South Topeka*, 38 Kan. 368, 16 Pac. 332.

A provision in such statute, that the existing ordinances shall remain in force, provided they shall be recorded within four months thereafter, is merely directory; and a non-compliance therewith does not affect the validity of such ordinances. *Trustees Erie Academy v. Erie*, 31 Pa. St. 515.

#### 77. § 315 *ante*.

**Dissolution and reincorporation.** Where a town is reincorporated with the same name and substantially the same powers as before but with some excision of population and territory, the effect is not to extinguish the debts of the original corporation, but to leave them subsisting as valid obligations against the new one. *Ross v. Wimberly*, 60 Miss. 345, over-

ruling *Port Gibson v. Moore*, 13 Smed. & M. (Miss.) 157.

*Episcopal C. Soc. v. Episcopal Ch.*, 1 Pick. (Mass.) 372; *Atty. Gen. v. Leicester*, 9 Beav. 546.

The effect of a new charter in reincorporation merely continues the old corporation and does not have the effect of extinguishing the debts of the city incurred under the former charter. *Smith v. Morse*, 2 Cal. 524, 554; *Hopkins v. Swansea*, 4 M. & W. 621.

"It has never been disputed that new charters revive, and give activity, to the old corporation; where the question has arisen, in which there was any remarkable metamorphosis, it has always been determined that they remain the same as to debts and rights." Per Lord Mansfield, quoted in *Smith v. Morse*, 2 Cal. 524, 554.

Question discussed as to effect of reorganizing a public corporation. *Savannah v. Steamboat Co.*, *R. M. Charlt.* (Ga.) 342.



§ 846. Same—by consolidation or change of corporate limits.

And if the change occurs by change of limits or absorption or consolidation, in the absence of legal provision to the contrary, as pointed out elsewhere,<sup>78</sup> all franchise ordinances and ordinances resulting in contracts which have created a liability or obligation upon the part of the city and private persons or corporations, are not affected by the consolidation, but are continued in force, and the liability of the annexed town is assumed by the consolidated town, upon the principle that, having received the benefits of the assets, this is a sufficient consideration for being charged with the debts and liabilities of the territory annexed.<sup>79</sup>

Where a consolidation of two or more towns is effected, each having its peculiar ordinance provisions, it is sometimes provided in the act of consolidation that the ordinances then in force shall remain in force within the limits of the territory for which they were enacted, until repealed by the aldermen of the consolidated city.<sup>80</sup>

As stated elsewhere,<sup>81</sup> a municipal ordinance, regulation or contract designed for the city at large operates throughout its boundaries whatever their change.<sup>82</sup>

78. § 314 *ante*.

79. *Schriber v. Langdale*, 66 Wis. 616, 29 N. W. 547, 554.

80. *Roche v. Jersey City*, 40 N. J. L. 257.

An ordinance passed by the board of aldermen of the consolidated city was held to apply to the whole city and that it acted as a repeal of all ordinances in the respective cities forming the consolidated city upon that subject. *Roche v. Jersey City*, 40 N. J. L. 257.

Where a village corporation is created whose limits among other territory comprises parts of two towns, and the power to improve the streets of the new corporation

is vested in a board of village trustees, it has the effect of repealing or superseding the power of the old towns to make improvements. *Bull v. Southfield*, 14 Blatch. (U. S.) 216, 4 Fed. Case No. 2120.

Special provisions as to force of ordinance where two cities consolidate. *Camp v. Minneapolis*, 33 Minn. 461, 23 N. W. 845.

Prior ordinances remain in force, when. *People v. Harrison*, 191 Ill. 257, 61 N. E. 99, affirming 92 Ill. App. 643.

81. § 657 *ante*.

82. *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121; *Toledo v. Edens*, 59 Iowa 352, 13 N. W. 313.

## CHAPTER 22.

## PLEADING ORDINANCES IN CIVIL PROCEEDINGS.

Sec.	Sec.
847. Pleading ordinances when cause of action is founded thereon.	853. Same—proof of acceptance of ordinance by defendant.
848. Same—illustrative cases.	854. Same—relating to public safety.
849. Judicial notice of ordinances.	855. Same—relating to operation of railroad trains and street cars.
850. Pleading substance of ordinance.	856. Same—relating to the removal of snow and ice.
851. Pleading ordinance by title and date of passage.	857. Pleading in actions on special taxbills for improvements.
852. Pleading negligence in violation of ordinance.	

### § 847. Pleading ordinances when cause of action is founded thereon.

Where a cause of action is founded upon an ordinance the plaintiff must plead the ordinance, or so much of it as relates to the action must be set out in the declaration. The same is true where the defendant relies upon an ordinance as the ground of his defense; he must plead it in his answer.<sup>1</sup> And where the action is brought to enforce the performance of a duty imposed by an ordinance, the ordinance must be pleaded.<sup>2</sup> This is required

1. *Idaho*. *People v. Buchanan*, 1 *Idaho* 681.

*Illinois*. *Cordatos v. Chicago*, 129 *Ill. App.* 471; *Buckley v. Eisend-rath*, 58 *Ill. App.* 364.

*Indiana*. *Clevenger v. Rushville*, 90 *Ind.* 258.

*Kentucky*. *Bradford v. Jones*, 142 *Ky.* 820, 135 *S. W.* 290.

*Missouri*. *Mooney v. Kennett*, 19 *Mo.* 551; *State ex rel. v. Sher-man*, 42 *Mo.* 210.

*New York*. *People v. New York*,

7 *How. Pr.* (N. Y.) 81; *Helling v. Boss*, 121 *N. Y. S.* 1013.

*Oregon*. *Pomeroy v. Lappens*, 9 *Ore.* 363.

*Wisconsin*. *Stittgen v. Rundle*, 99 *Wis.* 78, 74 *N. W.* 536.

*United States*. *Garlich v. North-ern Pac. Ry. Co.*, 131 *Fed.* 837.

2. *Charleston v. Ashley Phos-phate Co.*, 34 *S. C.* 541, 13 *S. E.* 845; *Rockford City Ry. Co. v. Mat-thews*, 50 *Ill. App.* 267.

because state courts do not take judicial notice of municipal ordinances.<sup>3</sup>

An averment that the passage of a municipal ordinance relied upon was procured by bribery, not specifying the names of the officers bribed, nor the sums paid or promised, is not sufficiently definite and certain on demurrer.<sup>4</sup>

### § 848. Same—illustrative cases.

In an action by *mandamus* to compel the issuance of a building permit, an allegation that the petitioner has complied with all the requirements of the ordinances of the city relative to the erection of buildings therein, is not sufficient. The ordinance, or so much thereof as is relied upon, should be set forth.<sup>5</sup> So in an action by a city marshal to recover salary, fixed by an ordinance, the ordinance must be set out in, or filed with, the declaration.<sup>6</sup> So a complaint upon a cause of action based upon the making and annulling of a contract by a city must contain a copy of the orders of the council in making and annulling the contract.<sup>7</sup>

In an action to recover an office which has been created by ordinance it is not necessary to set out the entire ordinance creating the office, but it will be sufficient to state substantially only so much thereof as is necessary to show *prima facie* the plaintiff's title and right to recover.<sup>8</sup>

In an action by a property owner against the city for damages caused by raising the grade of a street, an allegation that the city raised the grade was held equiva-

3. § 849 *post*.

4. *Perry v. New Orleans, M. & C. Ry. Co.*, 55 Ala. 413.

Rule applies to all courts. The rule applicable to pleading ordinances is the same whether the cause of action originated in the justice court or circuit court. *Judd v. W., St. L. & P. Ry. Co.*, 23 Mo. App. 56.

5. *Burkley v. Eisendrath*, 58 Ill. App. 364.

6. *Brazil v. McBride*, 69 Ind. 244.

7. *Terre Haute v. Lake*, 43 Ind. 480.

8. *Callopy v. Cloherty*, 95 Ky. 330, 25 S. W. 497.

lent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinances.<sup>9</sup>

So in pleading that an ordinance was duly passed, it is necessarily implied that all essential antecedent acts, requisite to the legal enactment of the ordinance, were done.<sup>10</sup> Thus in an action by the city for condemnation of land, an averment that an ordinance was duly "passed and adopted," is a sufficient statement that everything necessary to be done by the council to give it legal effect had been done.<sup>11</sup>

But under the charter of St. Louis it is held that the petition for the condemnation of private property for a street must show that the ordinance providing for opening the street was passed as provided by the charter—either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground, fronting on the proposed street.<sup>12</sup>

In an action to recover a sum stipulated by ordinance to be paid for the privilege of operating passenger cars upon the streets the declaration must set out enough of the ordinance so that it will appear upon its face that the defendant is within its provisions.<sup>13</sup>

9. Werth v. Springfield, 78 Mo. 107; Stewart v. Clinton, 79 Mo. 603; Unionville v. Martin, 95 Mo. App. 28, 68 S. W. 605.

10. Becker v. Washington, 94 Mo. 375, 7 S. W. 291.

11. Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890.

"In respect to a municipal ordinance it need not be alleged that all proper formalities were observed in its passage." State ex rel. v. Henzler (N. J. Ch., 1898), 41 Atl. 228.

An allegation that the council passed the ordinance is not a statement of a conclusion of law,

but of a fact, and is sufficient. Tennessee Paving Brick Co. v. Barker, 119 Ky. 654, 60 S. W. 690.

An allegation that an ordinance was enacted by the board of trustees is sufficient, such board alone being authorized to enact ordinances. Vinson v. Monticello, 118 Ind. 103, 19 N. E. 734; Hardenbrook v. Ligonier, 95 Ind. 70.

12. St. Louis v. Gleason, 89 Mo. 67, 14 S. W. 768.

13. Cape May v. Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948.

In an action for damages an allegation that the defendant "wantonly, carelessly, recklessly and negligently" omitted to do acts imposed on it by a municipal ordinance, is sufficient to allow the admission of the ordinance in evidence to show negligence.<sup>14</sup>

In an action against a railroad based upon a violation of the speed ordinance, it was held that it sufficiently appears by direct averments that the speed ordinance was in force at the time of the accident where the plaintiff states that it was in force and sets it out in full.<sup>15</sup>

### § 849. Judicial notice of ordinances.

Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes.<sup>16</sup> But state courts will not take judicial notice of ordinances of municipal corporations; hence, as mentioned, they must be pleaded with as much

14. *Brasington v. South Bound Ry. Co.*, 62 S. C. 325, 40 S. E. 665.

15. *Pittsburg, etc. Ry. Co. v. Rogers* (Ind. App., 1909), 87 N. E. 28.

16. *Alabama*. *Albrittin v. Huntsville*, 60 Ala. 486; *Perryman v. Greenville*, 51 Ala. 507, 510.

*Illinois*. *Doyle v. Bradford*, 90 Ill. 416; *Potwin v. Johnson*, 108 Ill. 70; *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688; *Harmon v. Chicago*, 110 Ill. 400.

*Minnesota*. *State v. Tosney*, 26 Minn. 262, 3 N. W. 345; *Burfening v. Chicago, etc., Ry. Co.*, 46 Minn. 20.

*Missouri*. *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. 326;

*St. Louis v. Lang*, 131 Mo. 412, 420, 33 S. W. 54; *State ex rel. v. Sherman*, 42 Mo. 210.

*Virginia*. *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

*Vermont*. *Winooski v. Gokey*, 49 Vt. 282.

*Wisconsin*. *Smith v. Janesville*, 52 Wis. 680, 9 N. W. 789; *Rains v. Oshkosh*, 14 Wis. 372; *Swain v. Comstock*, 18 Wis. 463.

The court will judicially notice an amendment to the charter passed by the legislature of a municipality notwithstanding an ordinance was necessary to adopt such amendment. *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

certainty of description as to their subject-matter as a contract or other private paper.<sup>17</sup>

Courts of the state take judicial notice of public laws of the state. Ordinances when legally enacted operate throughout the limits of the city in like manner as public laws operate within the state limits. The city or municipal courts bear the same relation to ordinances of the

17. *Alabama.* Case v. Mobile, 30 Ala. 538.

*Arkansas.* Strickland v. Little Rock, 68 Ark. 483, 60 S. W. 26; Gardner v. State, 80 Ark. 264, 97 S. W. 48.

*Colorado.* Greeley v. Heamman, 12 Colo. 94, 20 Pac. 1; Weiss-Chapman Dairy Co. v. People, 39 Colo. 374, 89 Pac. 778; Fay v. Ft. Collins, 40 Colo. 262, 90 Pac. 512; Garland v. Denver, 11 Colo. 534, 19 Pac. 460.

*Georgia.* Moore v. Jonesboro, 107 Ga. 704, 33 S. E. 435; Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354; The Western & Atlantic Ry. Co. v. Young, 81 Ga. 397, 7 S. E. 912.

*Idaho.* People v. Buchanan, 1 Idaho 681.

*Illinois.* Bloomington v. Illinois Cent. Ry. Co., 154 Ill. 539, 39 N. E. 478; Cordatos v. Chicago, 129 Ill. App. 471; O'Hare v. Lieb, 66 Ill. App. 549; Lasher v. Littell, 104 Ill. App. 211, affirmed 202 Ill. 551, 67 N. E. 372; Chicago, W. D. Ry. Co. v. Klauber, 9 Ill. App. 613; People v. Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230; Illinois Central R. R. Co. v. Ashline, 171 Ill. 313, 49 N. E. 521; Stott v. Chicago, 205 Ill. 281, 68 N. E. 736.

*Indiana.* Green v. Indianapolis, 22 Ind. 192.

*Iowa.* Wolf v. Keokuk, 48 Iowa, 129; Stier v. Oskaloosa, 41 Iowa, 353; Goodrich v. Brown, 30

Iowa, 291; Garvin v. Wells, 8 Iowa 286.

*Kansas.* McPherson v. Nichols, 48 Kan. 430, 29 Pac. 679; Watt v. Jones, 60 Kan. 201, 207, 56 Pac. 16.

*Kentucky.* Lucker v. Commonwealth, 4 Bush. (Ky.) 440.

*Louisiana.* New Orleans v. Labatt, 33 La. Ann. 107; Hassard v. Municipality, No. 2, 7 La. Ann. 495.

*Maine.* Lewistown v. Fairfield, 47 Me. 481.

*Massachusetts.* O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350.

*Maryland.* Shanfelter v. Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648.

*Michigan.* Gardner v. Ry. Co., 99 Mich. 182, 58 N. W. 49; Richter v. Harper, 95 Mich. 221, 54 N. W. 768.

*Minnesota.* Winona v. Burke, 23 Minn. 254.

*Missouri.* St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; Butler v. Robinson, 75 Mo. 192; State v. Oddle, 42 Mo. 210; Keane v. Klausman, 21 Mo. App. 485; Cox v. St. Louis, 11 Mo. 431; Bowie v. Kansas City, 51 Mo. 454; St. Louis v. St. Louis Ry. Co., 12 Mo. App. 591; Mooney v. Kennett, 19 Mo. 551; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918; Canton v. Madden, 120 Mo. App. 404, 96 S. W. 699; Tarkio

city as the state courts do to the public laws of the state. Hence, on principle, the municipal courts may for like reason take judicial notice of all city ordinances of a general nature, or those having a general obligatory force throughout the city. And the rule that courts will not take judicial notice of municipal ordinances does not apply to police courts and city courts, which have jurisdiction of complaints for the enforcement of ordinances. They will take judicial notice of their ordinances, without allegation or proof of their existence.<sup>18</sup>

*v. Lloyd*, 179 Mo. 600, 78 S. W. 797; *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182.

*New York.* *Harker v. New York*, 17 Wend. 199; *People v. Ahearn*, 109 N. Y. S. 249, 124 App. Div. 840; *Daly v. O'Brien*, 112 N. Y. S. 304, 60 Misc. Rep. 423; *Schnaier & Co. v. Grigsby*, 117 N. Y. S. 455; *Tucker v. O'Brien*, 117 N. Y. S. 1010; *Boston v. Abraham*, 86 N. Y. S. 863, 91 App. Div. 416; *Porter v. Waring*, 69 N. Y. 250; *Sachs v. Lyons*, 103 N. Y. S. 149, 53 Misc. Rep. 640; *People v. Mayor of New York*, 7 How. Pr. 81; *Harker v. New York*, 17 Wend. 199.

*Ohio.* *Esch v. Elyria*, 27 Ohio Cir. Ct. 446.

*Pennsylvania.* *Com. ex rel. v. Chittenden*, 2 Pa. Dist. 804.

*South Carolina.* *Charleston v. Ashley Phosphate Co.*, 34 S. C. 541, 13 S. E. 845.

*Texas.* *Austin v. Walton*, 68 Tex. 507, 5 S. W. 70; *Int. & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545, 81 S. W. 82; *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640.

*Virginia.* *Norfolk & P. Trac-tion Co. v. Forrest's Admx.*, 109 Va. 658, 64 S. E. 1034.

*Wisconsin.* *Horn v. The Chi-cago & N. W. Ry. Co.*, 38 Wis. 463; *Stittyeen v. Rundle*, 99 Wis. 78, 74 N. W. 536; *State v. Koch*, 138 Wis. 27, 119 N. W. 839, citing *McQuil-lin*, Mun. Ord., § 373.

*United States.* *Robinson v. Denver City Trainway Co.*, 164 Fed. 174; *Garlich v. Northern Pac. Ry. Co.*, 131 Fed. 837.

"Courts do not take judicial no-tice of city ordinances. Such or-dinances should be pleaded and proved." *Suth. St. Const.* (2 Ed.), § 296.

The Massachusetts statute makes it sufficient to describe fully the act complained of and state that it violated the ordi-nance made and provided in such case. *Com. v. Odenweller*, 156 Mass. 234, 30 N. E. 1022; *Com. v. Nightingale*, Thach. Cr. Cas. 251.

Where the warrant and affi-davit do not set forth an ordi-nance nor refer to one so that it can be identified, the prosecu-tion cannot be sustained. *State v. Lunsford*, 150 N. C. 862, 64 S. E. 765.

18. *California.* *Ex parte Han-sen*, 158 Cal. 494, 111 Pac. 528; *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258.

### § 850. Pleading substance of ordinance.

Sometimes it is sufficient in pleading to set out the substance of the ordinance.<sup>19</sup> In pleading private statutes the common law practice was to recite so much of the act as was pertinent to the issue made. In pleading the substance of an ordinance all of the ordinance that is legally necessary must appear, and it is generally sufficient if the descriptive words of the ordinance are fol-

*Georgia.* Taylor v. Sandersville, 118 Ga. 63, 44 S. E. 845; Walker v. Fitzgerald, 103 Ga. 423, 30 S. E. 253; Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354.

*Iowa.* Scranton v. Danenbaum, 109 Iowa 95, 80 N. W. 221; Laporte City v. Goodfellow, 47 Iowa 572; State v. Leiber, 11 Iowa 407; Conboy v. Iowa City, 2 Iowa 90.

*Kansas.* Solomon v. Hughes, 24 Kan. 211; West v. Columbus, 20 Kan. 633.

*Maine.* O'Malia v. Wentworth, 65 Me. 129.

*Nebraska.* Foley v. State, 42 Neb. 233, 60 N. W. 574; Steiner v. State, 78 Neb. 147, 110 N. W. 723.

*New Jersey.* Galen Hall Co. v. Atlantic City, 76 N. J. L. 20, 68 Atl. 1092.

*South Carolina.* Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523; Charleston v. Chur, 2 Bailey (S. C.) 164. Information against Oliver, 21 S. C. 318.

*West Virginia.* Moundsville v. Velton, 35 W. Va. 217, 13 S. E. 373; Wheeling v. Black, 25 W. Va. 266.

In an Oregon case it was further held that the municipal courts will take judicial notice "of such journals and records of the lawmaking body as affect their

validity, meaning and construction in like manner and for like purposes as the courts of the state take judicial cognizance of the public statutes of the state."

"But it must affirmatively appear from the journal of the common council that the mandatory provisions of the fundamental law (charter) relative to the passage of the ordinance have not been observed."

"Mere silence of the journals as to such a requirement will not suffice to overthrow it." Portland v. Yick, 44 Ore. 432, 75 Pac. 706, 102 Am. St. Rep. 633.

19. *Illinois.* St. Louis, etc. R. Co. v. Eggmann, 60 Ill. App. 291, affirmed 161 Ill. 155, 43 N. E. 620.

*Missouri.* Apitz v. Mo. Pac. Ry. Co., 17 Mo. App. 419; Kansas City v. Johnson, 78 Mo. 661; Hirst v. Ringen Real Estate Co., 169 Mo. 194, 200, 69 S. W. 368; Moberly v. Hogan, 131 Mo. 19, 25, 32 S. W. 1014.

*New Jersey.* Keeler v. Mill-edge, 24 N. J. L. 142; Kip v. Paterson, 26 N. J. L. 298.

*Wisconsin.* Decker v. McSorley, 111 Wis. 91, 86 N. W. 554; Janesville v. Milwaukee & M. R. Co., 7 Wis. 484.



lowed.<sup>20</sup> The contents should be so stated that the court can judge from the provision of the ordinance itself.<sup>21</sup>

Where the plaintiff depends upon an ordinance for his rights it is not sufficient to refer to "certain terms of an ordinance," but the terms upon which he relies must be set out in the declaration.<sup>22</sup>

In an action by *quo warranto* to oust the occupant of an office the party asserting a right founded upon ordinances must set them forth in the pleading in whole or in substance.<sup>23</sup> In a suit to recover a merchant tax, pleading that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied and is sufficient to authorize the reception of the ordinance in evidence.<sup>24</sup>

In an injunction proceeding by a gas company, having the right to make reasonable charges for gas, to restrain the enforcement of an ordinance arbitrarily fixing the

20. *Woods v. Prineville*, 19 Ore. 108, 23 Pac. 880.

21. *Austin v. Walton*, 68 Tex. 507, 5 S. W. 70; *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640.

Pleading ordinance. "In a complaint predicated upon a town ordinance, it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out in or with the complaint as much of the ordinance as relates to the action or prosecution. *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706.

Likewise, averments showing, in substance, that the necessary steps were taken and setting out the substance of the contract (this was an action to enforce the lien on abutting property for street improvements) are sufficient. *Lexington v. Woolfolk*, 25 Ky. L.

Rep. 1817, 78 S. W. 910; *Lexington v. Hayman*, 25 Ky. L. Rep. 1817, 78 S. W. 910.

Held, an objection to the admission in evidence of an ordinance should be sustained if not pleaded in terms or in substance so that the court could from the plea determine what was required of the defendant. *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640.

22. *Cincinnati Water Co. v. Cincinnati*, 4 Ohio 443.

23. But if the material allegations were founded upon a city charter, and the act was pleaded by its title, the court could, under the provisions of the practice act, take judicial notice of its provisions. *State v. Oddle*, 42 Mo. 210.

24. *Kansas City v. Johnson*, 78 Mo. 661.

price of gas, the complaint is not bad for failure to state that the prices charged are reasonable. In the absence of proof to the contrary they are presumed to be reasonable.<sup>25</sup>

In one case the petition alleged that the charter authorized the city to pass an ordinance limiting the speed of vehicles; that pursuant thereto the city had enacted an ordinance prohibiting driving faster than six miles an hour; the book of ordinances containing the ordinance involved being exhibited to the court for identification and made a part of the petition by reference, it was ruled that the ordinance was sufficiently pleaded.<sup>26</sup>

An ordinance is not admissible in evidence when it is not alleged either in terms or in substance, so that the court can from the plea determine what was required of defendant. The conclusions of the pleader as to the legal effect of the ordinance in this respect are not sufficient.<sup>27</sup>

A mere allegation that one erecting a building failed to comply with municipal ordinances whereby the building was rendered unsafe for occupancy, is not sufficient to admit proof of a violation of any particular ordinance.<sup>28</sup>

## § 851. Pleading ordinance by title and date of passage.

In some jurisdictions it is permissible by statute to plead an ordinance by referring to its title, number and date of its passage;<sup>29</sup> but a statute which provides that

25. *Noblesville v. Noblesville Gas, etc. Co.*, 157 Ind. 162, 60 N. E. 1032.

26. *Foley v. Northup*, 47 Tex. Civ. App. 277, 105 S. W. 229.

27. *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640.

28. *Helling v. Boss*, 121 N. Y. S. 1013.

29. *California. Ex parte Davis*, 115 Cal. 445, 47 Pac. 258.

*Colorado. Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820.

*Indiana. Whitson v. Franklin*, 34 Ind. 392; *Huntington v. Cheesbro*, 57 Ind. 74; *Goshen v. Kern*, 63 Ind. 468, 30 Am. Rep. 234; *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802.

*Minnesota. Fairmont v. Meyer*, 83 Minn. 456, 86 N. W. 457.

*Missouri. Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090.



may be introduced in evidence to show such negligence, although not pleaded.<sup>33</sup> Thus is an action against a contractor for damages caused by the negligent manner in which he blasted rock near the plaintiff's house, an ordinance of the city providing that any one blasting within the city limits should cover the orifice in which the explosive was placed, so as to prevent fragments of rock from being thrown into the air, was held to be admissible in evidence, where the petition alleged that the blasts were set off in such a negligent manner as to cause "loose fragments of rock to be thrown upon plaintiff's home."<sup>34</sup>

The general rule is that an ordinance tending to show negligence must be pleaded where it is relied upon as giving a right to recover.<sup>35</sup> But where an ordinance is relied on as a cause of action, establishing negligence, it is sufficient to plead it by statement of the substance, general terms, and legal effect of the ordinance.<sup>36</sup>

It follows from what has been stated herein that, if the ordinance is used as a *mere matter of evidence*, the petition not being based on a violation thereof, but upon

33. *California*. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 Pac. 1063.

*Massachusetts*. Lane v. Atlantic Works, 111 Mass. 136.

*Minnesota*. Faber v. St. Paul, M. & M. Ry. Co., 29 Minn. 465, 13 N. W. 902; Kelly v. St. Paul, M. & M. Ry. Co., 29 Minn. 1, 11 N. W. 67; Klotz v. Winona & St. P. Ry. Co., 68 Minn. 341, 71 N. W. 257.

*Missouri*. Bragg v. Met. St. Ry. Co., 192 Mo. 331, 91 S. W. 527; Judd v. W. St. L. & P. Ry. Co., 23 Mo. App. 56; Riley v. The W. St. L. & P. Ry. Co., 18 Mo. App. 385; Robertson v. W. St. Louis & Pac. Ry. Co., 84 Mo. 119; Goodwin v. Chicago, Rock Island & Pac. Ry. Co., 75 Mo. 73.

*Nebraska*. Union Pac. R. Co. v. Rasmussen, 25 Neb. 810.

*South Carolina*. Nohrden v. North Eastern Ry. Co., 54 S. C. 492, 32 S. E. 524; Brasington v. South Bound Ry. Co., 62 S. C. 325, 40 S. E. 665.

*Virginia*. Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034; Norfolk Ry., etc. Co. v. Corletto, 100 Va. 355, 41 S. E. 740; Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

34. Mahoney v. Dankwart, 108 Iowa 321, 79 N. W. 134.

35. Richter v. Harper, 95 Mich. 221, 54 N. W. 768.

36. Hirst v. Ringen Real Estate Co., 169 Mo. 194, 69 S. W. 368.

a violation of a duty imposed (by general law); such ordinance need not be pleaded.<sup>37</sup>

§ 853. Same—proof of acceptance of ordinance by defendant.

Many cases hold that the violation of an ordinance, regulating the speed of trains is negligence *per se*,<sup>38</sup> and where the plaintiff bases his cause of action upon an ordinance, regulating the speed of trains, it is not necessary to the admission of the ordinance in evidence that he show and plead an agreement upon the part of the defendant to comply with the ordinance, or that the defendant had accepted the ordinance.<sup>39</sup> Prior to the decision in the case of *Jackson v. Railroad*,<sup>40</sup> it had been held in Missouri that the plaintiff in order to recover where the violation of an ordinance is relied upon to establish negligence, must allege and prove an agree-

37. *Bailey v. Kansas City*, 139 Mo. 503, 87 S. W. 1182.

In an action by a passenger wrongfully put off a street car, an ordinance on the subject of transfers is admissible in evidence. *Traction Co. v. Brethauer*, 223 Ill. 521, 79 N. E. 287, affirming 125 Ill. App. 204.

Contrary to what seems to be the general rule that where the action is not founded upon the ordinance, but upon the allegation of negligence, the ordinance may be introduced in evidence though not pleaded, it has been held that, to be admissible in evidence the ordinance must be pleaded even to show negligence. *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Blanchard v. Lake Shore & M. S. R. Co.*, 126 Ill. 416, 18 N. E. 799, affirming 27 Ill. App. 22.

38. *Prewitt v. Railroad*, 134 Mo. 615, 36 S. W. 667; *Gratiot v. Railroad*, 116 Mo. 450, 21 S. W. 1094; *Dickson v. Railroad*, 104 Mo. 491, 16 S. W. 381; *Hanlon v. Railroad*, 104 Mo. 381, 16 S. W. 233; *Murray v. Railroad*, 101 Mo. 236, 13 S. W. 817; *Drain v. Railroad*, 86 Mo. 574; *Kellny v. Railroad*, 101 Mo. 67, 13 S. W. 806.

See § 873 *post*.

39. *Jackson v. Kansas City, F. S. & M. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, refusing to follow *Fath v. Tower Grove & L. Ry. Co.*, 105 Mo. 537, 16 S. W. 913.

To the same effect, *Weller v. Chicago, M. & St. P. Ry. Co.*, 164 Mo. 180, 64 S. W. 141; *Hutchinson v. Mo. Pac. Ry. Co.*, 161 Mo. 246, 61 S. W. 635.

40. 157 Mo. 621, 58 S. W. 32.

ment upon the part of the defendant to accept the ordinance violated.<sup>41</sup>

### § 854. Same—relating to public safety.

The violation of ordinances which have for their purpose the protection of the lives, limbs, health, comfort and quiet of all persons within the city, such as ordinances regulating the speed of trains and street cars within the corporate limits, and the regulation and protection of dangerous openings and hatchways upon the premises of persons or firms, passed for the protection of persons rightfully upon the premises, is negligence *per se*, and in some states, at least, it is held that the plaintiff, where his cause of action is based upon negligence, may introduce the ordinance in evidence and prove its violation, although the ordinance was not pleaded.<sup>42</sup>

### § 855. Same—relating to operation of railroad trains and street cars.

But, on the other hand, it has been held that in an action for damages resulting from the negligence of a railroad company, an ordinance fixing the rate of speed of cars within the city limits is material and if relied

41. *Fath v. Tower Grove & L. Ry. Co.*, 105 Mo. 537, 16 S. W. 913; *Sanders v. Southern Elec. Ry. Co.*, 147 Mo. 411, 48 S. W. 855; *Byington v. St. Louis Ry. Co.*, 147 Mo. 673, 49 S. W. 876; *Sheehan v. Citizens' Ry. Co.*, 72 Mo. App. 524.

But these cases have not been followed in the more recent decisions, as appears from the cases in the preceding note. *Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110, 119, 76 S. W. 693.

If the ordinance depends for its vitality upon its acceptance, it

is inadmissible in evidence without proof of its acceptance. *Sutor v. International, etc. R. Co.* (Tex. Civ. App., 1910), 125 S. W. 943.

42. *Jackson v. K. C. F. S. & M. Ry. Co.*, 157 Mo. 621, 58 S. W. 32; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737; *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194, 69 S. W. 368.

Ordinances relating to civil rights and liabilities, §§ 673 to 675 *ante*.

upon by plaintiff it must be specially pleaded.<sup>43</sup> Hence where the declaration contained no allegation that there was a city ordinance regulating the speed of engines, the admission of the ordinance in evidence was held erroneous.<sup>44</sup>

The rule has been declared in Michigan that where the plaintiff seeks to charge a street railway company with violation of duty imposed by ordinance, giving to him a right to recover, the ordinance must be pleaded.<sup>45</sup> But where, in an action against a railroad company for injury resulting from negligence, in running its trains in violation of an ordinance, the cause of action is based upon negligence and not on the ordinance, the ordinance may be introduced in evidence, to support the charge of negligence, although the existence of the ordinance has not been alleged in the pleading.<sup>46</sup> Under an allegation of "want of due care" evidence that the defendant omitted to ring the bell of the engine or sound the whistle as required by law was held admissible.<sup>47</sup>

### § 856. Same—relating to the removal of snow and ice.

The violation of ordinances requiring the abutting owners of property fronting on a street to remove ice and snow from the walks in front of their premises, is not such evidence of negligence, when the ordinance and

43. *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613.

In an action for damages against a street railway company an ordinance fixing the rate of speed in the city has a direct bearing on the question of negligence. *Moore v. St. Louis Transit Co.*, 95 Mo. App. 728, 75 S. W. 699; *Shinner v. Merchants' Bank*, 4 Allen (Mass.) 290.

44. *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613.

45. *Gardner v. Railway Co.*, 99 Mich. 182, 58 N. W. 49.

46. *Brasington v. South Bound*

*R. Co.*, 62 S. C. 325, 40 S. E. 665; *Lynn v. C., R. I. & P. Ry. Co.*, 75 Mo. 167.

See cases in § 852 *ante*.

47. *Jones v. Andover*, 10 Allen (Mass.) 18.

An allegation of the existence of an ordinance regulating the speed of trains, and an averment that such ordinance was duly enacted, merely raises the question of the existence of the ordinance at the time in question, and not the question of its validity. *Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226.

its violation is pleaded, as will entitle the plaintiff to recover in a suit for damages against the owner of the property for injuries received from a fall on the sidewalk.<sup>48</sup> It being the duty of the municipal corporation to keep its streets in a reasonably safe condition, it cannot shift that duty by requiring the abutting owner to remove the ice and snow and upon failure to do so create a civil liability in favor of any one injured by the violation of the ordinance.<sup>49</sup>

### § 857. Pleading in action on special tax bill for improvements.

The petition in a suit on a special tax bill, must allege that the work was done in accordance with the charter and ordinances.<sup>50</sup> The ordinance under which the work was done must be pleaded. The general averment that the ordinance, stating its general purport, was duly enacted, is usually sufficient.<sup>51</sup> It is not necessary to set out the ordinance in full, and the steps leading to its enactment, unless they constitute jurisdictional facts, in the proceedings, wherein the jurisdiction of the court is special and limited.<sup>52</sup>

In one case an allegation which stated the substance and general tenor of the ordinance which formed the foundation of plaintiff's demand, was held sufficient.<sup>53</sup>

48. *Kansas*. Jansen v. Atchison, 16 Kan. 358.

*Maryland*. Flynn v. Canton Co., 40 Md. 312.

*Massachusetts*. Kirby v. Boylston Market Assn., 14 Gray (Mass.) 249.

*Missouri*. Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242; St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637.

*Ohio*. Vandyke v. Cincinnati, 1 Disney (Ohio) 532.

*Rhode Island*. Heeney v. Sprague, 11 R. I. 456.

49. See §§ 673 to 675 *ante*.

50. Irvin v. Devors, 65 Mo. 625.

51. Eyerman v. Payne, 28 Mo. App. 72.

*Sufficiency*. Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090.

52. Herman v. Payne, 27 Mo. App. 481.

53. Especially is this so where the defendant has taken no steps by motion to have the petition made more definite and certain. Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014.



But where the plaintiff pleaded an ordinance by its number and the date of its approval, a motion to make more definite and certain was sustained. The court said: "Municipal ordinances, not being subjects of judicial notice, must be pleaded with as much certainty of description, as to their subject-matter and effect as a contract or other private paper."<sup>54</sup> So a petition on a special tax bill, which pleaded an ordinance by its number, title and date of passage, and failed to set out the substance of the ordinance, would be bad on demurrer.<sup>55</sup>

A complaint which avers that an ordinance for the improvement was enacted "by a two-thirds vote of her common council," the vote required by charter, is sufficient as to the validity of its passage.<sup>56</sup> However, under particular charter provisions, it has been held that the suit is based on the tax bill and not on the ordinance, hence, the ordinance need not be pleaded, but, if pleaded, it is sufficient to refer to it by giving its title and date of passage.<sup>57</sup>

In an action on a special tax bill the petition must show that the work was done and that the bill was issued as provided by the ordinance.<sup>58</sup>

Where a tax bill is issued payable in installments the petition must show that the ordinance authorizes the issue in installments.<sup>59</sup>

54. *Keane v. Klausman*, 21 Mo. App. 485, 489; *State v. Oddle*, 42 Mo. 210.

55. *Crone v. Mallinckrodt*, 9 Mo. App. 316; *St. Louis v. Stoddard*, 15 Mo. App. 173.

56. *Connersville v. Merrill*, 14 Ind. App. 303.

57. *Kansas City v. Am. Surety Co.*, 71 Mo. App. 315; *St. Louis v. Hardy*, 35 Mo. 261.

58. *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090.

59. *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090.

## CHAPTER 23.

## EVIDENCE OF ORDINANCES.

Sec.	Sec.
858. Proof of authority to enact.	868. Same—when original record required.
859. Proof of existence of ordinance, when required.	869. Same—proof by copy.
860. Burden of proof.	870. Same—sufficiency of authentication.
861. Judicial notice—appeal from municipal courts.	871. Same—proof in actions for penalties.
862. Proof of formal steps in enactment, when required.	872. Admissibility of parol testimony to prove.
863. Proof of record of ordinance.	873. Proof of violation of ordinance as evidence of negligence.
864. Proof of publication of ordinance, when required.	874. Proof of violation by plaintiff in actions for civil liability.
865. How proof of ordinance made.	
866. How ordinance proved.	
867. Same—ordinances published by authority.	

## § 858. Proof of authority to enact.

It seems that a conclusive presumption of the regularity of the passage of an ordinance does not exist.<sup>1</sup> Some courts have held that, in a prosecution to recover a penalty under an ordinance, proof of the authority to enact it is necessary,<sup>2</sup> as where the ordinance is objected to as incompetent evidence,<sup>3</sup> or where the objection is made on the ground that it interferes with common rights.<sup>4</sup> But where the violation of the ordinance is confessed by demurrer it is unnecessary to show the authority to enact it.<sup>5</sup> And where municipal police courts

1. *Altoona City v. Bowman*, 171 Pa. St. 307, 33 Atl. 187.

2. *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Schott v. People*, 89 Ill. 195; *Braceville v. Doherty*, 30 Ill. App. 645; *Alton v. Hartford Ins. Co.*, 72 Ill. 328; *State v. Threadgill*,

76 N. C. 17; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462.

3. *Schott v. State*, 89 Ill. 195.  
4. *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89.

5. *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802, 114 Ind. 600, 15 N. E. 804.

take judicial notice of ordinances it is not necessary to plead or prove the authority to enact.<sup>6</sup>

### § 859. Proof of existence of ordinance, when required.

Where the adoption of the ordinance is denied, it must be proved, to render it admissible in evidence,<sup>7</sup> for no recovery can be had in an action of debt for violation of an ordinance, where there is no evidence offered of the existence of such ordinance.<sup>8</sup>

The enactment can be proved by the proceedings of the council and their promulgation duly attested.<sup>9</sup> But it is not competent to prove by extrinsic testimony that an ordinance was voted upon and passed, where the journal of the council only showed that it was reported.<sup>10</sup> The book of ordinances kept by the municipal corporation containing the ordinance in question is *prima facie* evidence of its passage.<sup>11</sup>

6. § 849 *ante*, and chapter on actions to enforce police ordinances *post*.

7. Union Pac. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543.

See chapter on actions to enforce police ordinances, volume 3.

8. Stevens v. Chicago, 48 Ill. 498.

Where a legislative enactment provides that "all offenses against the criminal laws of this state occurring, within the limits of said corporation not amounting to a felony, shall be deemed violation of the ordinances of the City of Jackson and punishable as such," no special ordinance was necessary to give effect to the act or sustain a prosecution. Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015; Acts 1860, ch. 261, p. 304.

9. Breaux's Bridge v. Dupuis, 30 La. Ann. 1105; People v. Murray, 57 Mich. 396, 24 N. W. 118;

La Fitte v. Ft. Collins, 43 Colo. 299, 93 Pac. 1098.

10. Covington v. Ludlow, 1 Metc. (Ky.) 295.

11. Alabama. Barnes v. Alexander City, 89 Ala. 602, 7 So. 437; Selma S. & S. Ry. Co. v. Owen, 132 Ala. 420, 31 So. 598.

Georgia. Stone v. Tallulah Falls, 131 Ga. 452, 62 S. E. 592, citing McQuillin, Mun. Ord., § 383.

Illinois. Barr v. Auburn, 89 Ill. 361.

Mississippi. Greenwood v. Jones, 91 Miss. 728, 46 So. 161.

Book of printed ordinances held *prima facie* evidence of the existence and legality of ordinances. State v. King, 37 Iowa 462; Barr v. Auburn, 89 Ill. 361; Prell v. McDonald, 7 Kan. 426, 446; Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370, 19 S. W. 1053; Van Buren v. Wells, 53 Ark. 368, 377, 14 S. W. 38.

A lapse of fourteen years after the passage of the ordinance was held to raise a sufficient presumption of the existence of every fact necessary to the validity of the ordinance, including its approval by the mayor and publication.<sup>12</sup>

### § 860. Burden of proof.

The ordinance is presumed to be valid and reasonable where it has reference to a subject-matter which is within the corporate jurisdiction, unless the contrary appears on the face of the law itself.<sup>13</sup> Therefore, the general rule is that, when the validity of an ordinance is called in question, the burden is upon the party who denies the validity to demonstrate it by proper proof, as where the question of the lack of power to enact it is raised.<sup>14</sup> However, in a late New York case it was ruled

12. *Santa Rosa v. Central St. Ry. Co.* (Cal., 1895), 38 Pac. 986,

13. *Alabama. Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.  
*California. Ex parte McCoy* (Cal. App., 1909), 101 Pac. 419.

*Illinois. People ex rel. v. Cre- gler*, 138 Ill. 401, 28 N. E. 812;  
*Plymouth v. McWherter*, 152 Ill. App. 114.

*Indiana. Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802.

*New York. New York v. Dry Dock, etc. R. Co.*, 133 N. Y. 104, 30 N. E. 563.

*New Jersey. Trenton Horse Ry. Co. v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

*Pennsylvania. Scranton v. Straff*, 28 Pa. Super. Ct. 258; *West Conshohocken Borough v. Electric Light & Power Co.*, 29 Pa. Super. Ct. 7.

*Virginia. Norfolk, etc. Co. v. Norfolk*, 105 Va. 139, 52 S. E. 851.

*United States. Taylor v. Dis- trict of Columbia*, 24 App. Cas. (D. C.) 392.

14. *Alabama. Bryan v. Bir- mingham*, 154 Ala. 447, 45 So. 922.

*Illinois. Chicago & Alton Ry. Co. v. Carlinville*, 103 Ill. App. 251, affirmed in 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190.

*Indiana. Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802.

*Missouri. Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56.

*New York. Haywood v. N. Y. Cent. & H. Ry. Co.*, 59 Hun (N. Y.) 617, 13 N. Y. S. 177.

*Texas. Gulf, C. & S. F. Ry. Co. v. Holt*, 30 Tex. Civ. App. 330, 70 S. W. 591.

*Washington. Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981.

that, in a prosecution for violation of an ordinance limiting the speed of automobiles, passed by authority of an act of the legislature, which prescribes as a condition precedent to the validity of such an ordinance that the city or village have signs conspicuously placed at certain specified places designating the maximum speed allowed, it is incumbent on the prosecution to prove the validity of the ordinance by showing compliance with the condition.<sup>15</sup>

The introduction of the ordinance book, containing a certain ordinance, and showing its passage by the board, with the vote thereon, and the proper authentication thereof, together with evidence, as to its due publication, is *prima facie* proof of its validity, and the burden is upon the defendant to overcome the presumption.<sup>16</sup> In order to rebut the *prima facie* case made out by the plaintiff by the introduction of the book of ordinances, defendant must do more than merely cast doubt or suspicion upon the validity of the ordinance; he must "disprove its validity by showing that, as a matter of fact, it was never passed."<sup>17</sup>

If the defendant raises the objection that the ordinance has been repealed, the burden is upon him to prove it.<sup>18</sup> An ordinance properly proved is presumed to have continued in force until the contrary is shown.<sup>19</sup> When so

15. *People v. Keeper of Prison of Seventh District*, 121 App. Div. 645, 106 N. Y. S. 314, reversing 55 N. Y. Misc. Rep. 611, 106 N. Y. S. 960.

16. *California. Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392.

*Indiana. Pittsburgh, etc. Ry. Co. v. Rogers* (Ind. App., 1909), 87 N. E. 28.

The admissibility in evidence of the record of the proceedings of the council to show that the mandatory requirements of the organic law were not fully com-

plied with, does not destroy the presumption of verity which attaches to the enrolled act, to show clearly by the records that the fact is otherwise. And such proof must be conclusive. *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675.

17. *Chicago & A. Ry. Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56, 116 Am. St. Rep. 102.

18. *Hanna v. Kankakee*, 34 Ill. App. 186.

19. *Earlville v. Radley*, 141 Ill. App. 359; *St. Louis & T. H. R. R. Co. v. Eggmann*, 60 Ill. App. 291,

proved the burden is upon the defendant to overcome the presumption by the introduction of an ordinance regularly passed.<sup>20</sup>

The burden is upon one attacking an ordinance for want of publication to show affirmatively and satisfactorily that it has not been published.<sup>21</sup>

The burden is upon the one questioning the validity of the ordinance to show that interlineations which look suspicious and upon which he relies to defeat the ordinance, were "made before the execution of the contract or the approval of the public record." The general presumption that such an interlineation was regular and authorized will not hold good in a case like this.<sup>22</sup>

### § 861. Judicial notice—appeal from municipal courts.

While, as we have seen, municipal or city courts will take judicial notice of the ordinances and resolutions passed and in force within the jurisdiction of the court, without being pleaded and proved,<sup>23</sup> in many jurisdictions it is held, and the weight of authority seems to be

161 Ill. 155, 43 N. E. 620; *Cleveland C. C. & St. L. Ry. Co. v. Bender*, 69 Ill. App. 262; *Burke v. City & County Contract Co.*, 117 N. Y. S. 400, 133 App. Div. 113.

An ordinance shown in evidence to be in force at a given date is *prima facie* presumed to be still in force at the date of a subsequent action based upon it. *O'Leary v. Chicago, R. I. & P. Ry. Co.* (Iowa, 1905), 103 N. W. 362.

20. *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590.

21. *Arkansas. Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38.

*Kentucky. Muir's Admr' v. Bardstown*, 120 Ky. 739, 27 Ky. L. Rep. 1150, 87 S. W. 1096.

*New Jersey. State v. Atlantic City*, 34 N. J. L. 99, 106.

*Pennsylvania. Grier v. Homestead Borough*, 6 Pa. Super. Ct. 542.

*United States. Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350.

22. *Cox v. Mignery*, 126 Mo. App. 669, 682, 105 S. W. 675.

23. § 854 *ante*.

*California. Ex parte Hansen*, 158 Cal. 494, 111 Pac. 528.

*Georgia. Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354.

*Kansas. West v. Columbus*, 20 Kan. 633.

*New Jersey. Galen Hall Co. v. Atlantic City*, 76 N. J. L. 20, 68 Atl. 1092.

Judicial notice. The police justice may judicially notice an ordinance passed by the common

that, on appeal from such courts to a state court the latter will not take judicial notice of ordinances unless they have been pleaded in the municipal or city court and set out in the record.<sup>24</sup> But the better view appears to be that where an action for the violation of an ordinance has been commenced in a municipal or police court and the case is appealed, the latter court, whether state or municipal, will take judicial notice of the incorporation of

council, but not one passed by the board of excise commissioners. *Byer v. Harris*, 77 N. J. L. 304, 72 Atl. 136.

But a police court cannot take judicial notice of a by-law or ordinance of one of the city departments. *State v. Trenton*, 51 N. J. L. 495, 17 Atl. 1083.

24. *Alabama*. *Furhman v. Huntsville*, 54 Ala. 263.

*Arkansas*. *Strickland v. Little Rock*, 68 Ark. 483, 60 S. W. 26; *Gardner v. State*, 80 Ark. 264, 97 S. W. 48.

*Colorado*. *Garland v. Denver*, 11 Colo. 534, 19 Pac. 460; *Fay v. Ft. Collins*, 40 Colo. 262.

*Georgia*. *McDonald v. Lane*, 80 Ga. 497, 5 S. E. 628; *Mayson v. Atlanta*, 77 Ga. 662; *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435; *Walker v. Fitzgerald*, 103 Ga. 423, 30 S. E. 253; *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354.

*Idaho*. *People v. Buchanan*, 1 Idaho 681.

*Iowa*. *Garvin v. Wells*, 8 Iowa 286; *Goodrich v. Brown*, 30 Iowa 291.

*Maine*. *Lewiston v. Fairfield*, 47 Me. 481.

*Maryland*. *Shanfelter v. Baltimore*, 80 Md. 483, 31 Atl. 439; *Central Savings Bank v. Balti-*

*more*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283.

*Minnesota*. *Winona v. Burke*, 23 Minn. 254.

*Missouri*. *Cox v. St. Louis*, 11 Mo. 431.

*New York*. *Porter v. Waring*, 69 N. Y. 250; *Harker v. New York*, 17 Wend. (N. Y.) 199; *Sachs v. Lyons*, 103 N. Y. S. 149, 53 Misc. Rep. 640.

*South Carolina*. *Charleston v. Ashley Phosphate Co.*, 34 S. C. 541, 13 S. E. 845.

*Vermont*. *State v. Soragan*, 40 Vt. 450.

*Wisconsin*. *Stittgen v. Rundle*, 99 Wis. 78, 79 N. W. 536.

Where the parties stipulate that a paper filed in the appellate court is a genuine ordinance, it will not be evidence, as the appellate court only passes on cases as they appear in the trial court. *O'Connor v. Shahbona*, 49 Ill. App. 619.

**Local option.** The reviewing court refused to take judicial notice of the existence of local option in a county as determined by a vote of the people; not an ordinance. *Allen v. State*, 98 S. W. 869 (Tex. Court of Crim. Appeals, Dec., '06).

the city and of the existence or substance of its ordinances.<sup>25</sup>

### § 862. Proof of formal steps in enactment, when required.

It has been said that the same presumption does not exist respecting the regularity of the passage of an ordinance as in the case of an act of the legislature.<sup>26</sup> However in a Minnesota case it is asserted that "every presumption obtains in favor of the validity of an ordinance

*25. Kansas.* Solomon v. Hughes, 24 Kan. 211; Downing v. Miltonvale, 36 Kan. 740, 14 Pac. 281; Smith v. Emporia, 27 Kan. 528.

*Nebraska.* Foley v. State, 42 Neb. 233, 60 N. W. 574; Steiner v. State, 78 Neb. 147, 110 N. W. 723.

*New Jersey.* Galen Hall Co. v. Atlantic City, 76 N. J. L. 20, 68 Atl. 1092.

*Oregon.* Portland v. Yick, 44 Ore. 439, 75 Pac. 706, 102 Am. St. Rep. 633.

*West Virginia.* Moundsville v. Velton, 35 W. Va. 217, 13 S. E. 373.

**Judicial notice of ordinances.** By provision of the Code of Iowa, in an appeal from a town or city court, the district court takes judicial notice of ordinances the same as public statutes. *Scranton v. Danenbaum*, 109 Iowa 95, 80 N. W. 221.

Under the Kentucky statutes all courts take judicial cognizance of the ordinances of cities of the first class. Statutes 1894, § 2775. *Wooley v. Louisville*, 24 Ky. L. Rep. 1357, 71 S. W. 893.

Where an ordinance is enacted under a city charter requiring the courts to take judicial notice of its provisions, and the charter is subsequently repealed, the courts will still take judicial notice of the ordinance if it is in harmony with the repealing charter. *Gulf C. & S. F. Ry. Co. v. Holt*, 30 Tex. Civ. App. 330, 70 S. W. 591.

In a Washington case the opinion, concurred in by two other judges avoids directly passing upon the point as it was not necessary to do so, the ordinance having been sufficiently proved by the introduction of a bound volume published. But two of the judges concurring in the majority opinion also file a supplemental opinion that the court on appeal will take judicial notice of ordinances within the judicial knowledge of the police court on the former trial of the case. *Spokane v. Griffith*, 49 Wash. 293, 95 Pac. 84.

*26. Altoona v. Bowman*, 171 Pa. St. 307, 33 Atl. 187, 37 Wkly. Notes Cases (Pa.) 102; *Schott v. People*, 89 Ill. 195.



that there is in favor of the validity of an act of the legislature.”<sup>27</sup>

Where it appears that a city ordinance was enacted and the charter requires unanimity in its enactment this will be presumed until the contrary is shown.<sup>28</sup> So where a two-thirds vote is necessary to enact an ordinance the presumption is that the ordinance received such vote, in the absence of proof to the contrary.<sup>29</sup>

In an Illinois case the introduction of the ordinance was objected to. The charter provided that before an ordinance should be in force it should be submitted to the voters of the town for their approval or rejection, and that it should be published in a particular manner. It was held that these must be proved before the ordinance could be received in evidence.<sup>30</sup>

Ordinances published in book form will be presumed to have been signed by the mayor, in the absence of evidence to the contrary, where the city charter provides that such books shall be received in evidence without further proof.<sup>31</sup>

There is no presumption that other proceedings than those mentioned in the record were had in the passage of the ordinance.<sup>32</sup>

### § 863. Proof of record of ordinance.

The failure of the city to comply with a charter provision that all ordinances shall be recorded does not render the ordinance void, the provision being merely

27. *Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235.

28. *Louisville v. Hyatt*, 2 B. Mon. (41 Ky.) 177, 36 Am. Dec. 594; *Lexington v. Headley*, 5 Bush (Ky.) 508.

29. *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209; *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675.

30. *Schott v. People*, 89 Ill. 195.

31. *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532.

32. *Tracy v. People*, 6 Colo. 151.

As to sufficiency of record, etc., of council proceedings in the passage of ordinances, see § 619 *ante*.

directory.<sup>33</sup> And a city charter requiring ordinances to be recorded in a book kept for that purpose, is complied with by a publication of the ordinance in book form.<sup>34</sup> The fact that a printed ordinance was cut out and pasted in the record book instead of writing it in the book, is no objection to the admission of it in evidence.<sup>35</sup>

After an ordinance was signed by the mayor certain changes, and interlineations were made on the record. It was held that as the changes were made to show the true ordinance, as passed, that it was not an impeachment of the record, and the record of the ordinance as passed was admissible in evidence.<sup>36</sup>

The defendant may introduce a certified copy of the record of the proceedings of the board held at the meeting in which the ordinance was adopted to show that the ordinance was not passed as required.<sup>37</sup>

#### § 864. Proof of publication of ordinance, when required.

No general rule as to the presumption of the publication of ordinances can be deduced from the cases, as this is affected by the local regulations and the facts in each case. However, it seems that in the absence of evidence to the contrary it will be presumed that ordinances were duly published.<sup>38</sup> And the burden of proving failure to

33. *Allen v. Davenport*, 107 Iowa 90, 97, 77 N. W. 532; *Whalin v. Macomb*, 76 Ill. 49; *Upington v. Oviatt*, 24 Ohio St. 232, 241; *Amey v. Allegheny City*, 24 How. (U. S.) 364, 16 L. Ed. 614; *Stevenson v. Bay City*, 26 Mich. 44.

See § 695 *ante*.

34. *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532.

35. *Eubanks v. Ashley*, 36 Ill. 177.

36. *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014.

37. *Tracey v. People*, 6 Colo. 151.

38. *Mo. Pac. Ry. Co. v. Chick*,

6 Kan. App. 481, 50 Pac. 605; *Fonda v. Louisville*, 20 Ky. L. Rep. 1652, 49 S. W. 785; *Muir's Adm'r v. Bardstown*, 120 Ky. 739, 27 Ky. L. Rep. 1150, 87 S. W. 1096.

Compare *Larkin v. Burlington, etc. R. R. Co.*, 85 Iowa 492, 52 N. W. 480.

Under the New York Village Law, 1847, p. 546, C. 426, § 57, an ordinance is not admissible in evidence and cannot be considered by the jury without proof that it has been duly published. *Shaw v. New York Cent. & H. R. R. Co.*, 83 N. Y. S. 91, 85 App. Div. 137.

publish rests on one who denies the publication.<sup>39</sup> A copy of an ordinance duly certified by the recorder of a town is *prima facie* admissible in evidence in Iowa without proof that it was properly recorded and published.<sup>40</sup> So in Mississippi is a copy certified by the clerk of the municipality.<sup>41</sup> Proof of publication, in Indiana, is not required unless the publication is denied under oath.<sup>42</sup> Where an ordinance has been recognized by the city for a long time as being in force the publication will be presumed.<sup>43</sup> And after a long lapse of time the presumption of publication where it has never been called in question, and the ordinance has been acted on in the meantime, would be conclusive.<sup>44</sup>

Where the ordinances are published in book or pamphlet form by authority no other publication is necessary.<sup>45</sup>

It has been held that the publication of the ordinance must be shown by proper proof before a conviction under

39. *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

40. *Bayard v. Baker*, 76 Iowa 220, 40 N. W. 818.

41. *Greenwood v. Jones*, 91 Miss. 728, 46 So. 161.

42. *Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474; *Hardenbrook v. Ligonier*, 95 Ind. 70; *Green v. Indianapolis*, 25 Ind. 490; *Lake Erie, etc. R. Co. v. Noblesville*, 16 Ind. App. 20, 44 N. E. 652.

43. *Atchison v. King*, 9 Kan. 550; *Quincy v. Chicago, B. & Q. Ry. Co.*, 92 Ill. 21; *Santa Rosa v. Central St. Ry. Co. (Cal., 1895)*, 38 Pac. 986.

44. *Muir's Admr. v. Bardstown*, 120 Ky. 739, 27 Ky. L. Rep. 1150, 87 S. W. 1096.

45. *Alabama. Code of Alabama*, 1896, § 1822; *Southern Ry. Co. v. Weatherlow*, 153 Ala. 171, 44 So. 1019.

*Illinois. Raker v. Maquon*, 9 Ill. App. 155; *Chicago & A. Ry. Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56, 116 Am. St. Rep. 102, affirming 123 Ill. App. 88.

*Iowa. State v. King*, 37 Iowa 462.

*Texas. Hall v. International & G. N. Ry. Co.*, 98 Tex. 100, 81 S. W. 520; *Ft. Worth & R. H. St. Ry. Co. v. Hawes*, 48 Tex. Civ. App. 487, 107 S. W. 556.

Publication in "Book of Ordinances," held *prima facie* proof of proper publication. *Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350.

it can be sustained.<sup>46</sup> So where the statute requires that all ordinances imposing a fine shall be published, proof of the publication is a prerequisite to a recovery.<sup>47</sup> But where one sets up as a defense omission to publish, the burden is on him to establish it.<sup>48</sup>

### § 865. How proof of publication made.

In the absence of a statute or charter provision to the contrary, oral evidence has been held competent to prove the publication of an ordinance.<sup>49</sup> Where the publication was by posting, in order to give such posting effect, it must be shown that there was no newspaper published in the village in which such ordinance could have been

46. *Elizabethtown v. Lefler*, 23 Ill. 90; *Schott v. People*, 89 Ill. 195; *Barnet v. Newark*, 28 Ill. 62.

*Contra* *Charleston v. Chur.*, 2 Bailey (S. C.) 164.

47. *Hutchison v. Mt. Vernon*, 40 Ill. App. 19.

48. *Arkansas. Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

*California. People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

*Indiana. Lake Erie & W. R. Co. v. Brafford, Admr.*, 15 Ind. App. 655.

*Kansas. Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Atchison v. King*, 9 Kan. 550; *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281.

*Ohio. State ex rel. v. Oakwood*, 31 Ohio Cir. Ct. 632.

See §§ 697 to 699 *ante*.

49. *Eldora v. Burlingame*, 62 Iowa 32, 7 N. W. 148; *Des Moines v. Casady*, 21 Iowa 570; *Bayard*

*v. Baker*, 76 Iowa 220, 40 N. W. 818.

*Contra. Napa v. Easterly*, 61 Cal. 509.

Compare *Santa Rosa City R. Co. v. Central St. R. Co.*, 38 Pac. 986.

Where it was shown that the files of the paper in which the ordinance was published could not be obtained, and that no proof of publication was on file, parol evidence was held admissible to prove publication. *Larkin v. Burlington, etc. Ry. Co.*, 91 Iowa 654, 60 N. W. 195.

In the absence of charter or other provisions requiring proof of publication in a particular way, any competent proof tending to establish the publication of the ordinance is admissible. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.

Presumption of publication after lapse of time. *Quincy v. Chicago, etc. R. Co.*, 92 Ill. 21.

published.<sup>50</sup> The publication by posting may be proved by the testimony of the clerk that he posted up copies of the ordinance.<sup>51</sup> A memorandum upon the record of an ordinance reciting that it has been duly published was held to be *prima facie* proof of such fact.<sup>52</sup>

The certificates of the village clerk attached to the ordinance is sufficient evidence of due publication of the ordinance, by provision of the statute of Illinois.<sup>53</sup> A similar statute exists in Mississippi.<sup>54</sup> So, also, by statute in New Jersey a copy certified by the clerk of the town is admissible and is *prima facie* evidence of due publication and compliance with other requirements of the law.<sup>55</sup>

Where proof of the publication is not shown, as required by the charter, the ordinance is not admissible in evidence.<sup>56</sup> The introduction of the printed copy of

50. *Raker v. Maquon*, 9 Ill. App. 155.

51. *Teft v. Size*, 10 Ill. 432.

52. *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281.

53. *Pierson v. The People*, 204 Ill. 456, 68 N. E. 383; *Moss v. Oakland*, 88 Ill. 109; *Boyd v. Chicago, B. & Q. R. R. Co.*, 103 Ill. App. 199; *Illinois Central R. Co. v. Collison*, 134 Ill. App. 443.

But it is incompetent as evidence unless made so by statute, *Railroad v. Engle*, 76 Ill. 317.

Clerk's failure to date such certificate is no ground for excluding the ordinance. *Collison v. Illinois Cent. Ry. Co.*, 239 Ill. 532, 88 N. E. 251.

It is mandatory on the courts to accept such record and certificate as *prima facie* evidence of due passage and publication. *Blanchard v. Benton*, 109 Ill. App. 569.

The city clerk cannot "create

proof of the non-existence of any fact or record by his official certificate. Such negative proof requires oral testimony, under oath, of a search made and its results." *Boyd v. Chicago, B. & Q. R. Co.*, 103 Ill. App. 199.

54. *Code of Miss.* 1906, § 3409; *Greenwood v. Jones*, 91 Miss. 728, 46 So. 161.

55. *Montclair v. Scola*, 76 N. J. L. 137, 69 Atl. 451.

56. *Schott v. People*, 89 Ill. 195; *Pettit v. May*, 34 Wis. 666.

**Proof of publication.** Under the Kansas statute (Gen. St. 1901, § 1095), requiring the city clerk to enter every ordinance in an "Ordinance book" and append thereto as note showing the date of publication, an ordinance is inadmissible in evidence without proof of such note. *Atchison, T. & S. F. Ry. Co. v. Baker*, 79 Kan. 183, 98 Pac. 804.

An ordinance is inadmissible in evidence unless passage and pub-

the ordinance, with the affidavit of the printer, his foreman, or clerk, or any competent witness, stating the fact of its publication and the dates thereof, has been held sufficient.<sup>57</sup> The certificate of the clerk attached to an ordinance was held to be sufficient proof of publication where no objection was raised.<sup>58</sup>

An error in the printing of a word in the publication of an ordinance, will not affect its validity where it is plain from the context what word was intended.<sup>59</sup> So

lication comply with the substantial requirements of the statute. § 65, ch. 24, 1 Starr & Curtis Am. Stat., 2d Ed., 717, provides that ordinance imposing fines shall be published or posted, etc. § 66, provides that ordinances and the date of publication may be proved by the certificate of the clerk. Held, in this case that such certificate was insufficient, and the ordinance improperly admitted, in the absence of competent common law proof, because it did not recite the date of the posting nor allege that the recitals of the certificate are based on the records and files of his office. *Illinois Cent. R. Co. v. Kief*, 111 Ill. App. 354.

The production of the files of the paper by the editor showing proper publication is sufficient evidence thereof, the statutory provision (*Mill's Am. Stat.*, § 4443), making the book of ordinances *prima facie* evidence of publication, not being exclusive. *La Fitte v. Ft. Collins*, 43 Colo. 299, 93 Pac. 1098.

57. *Kettering v. Jacksonville*, 50 Ill. 39; *Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474; *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450.

Charter provided for proof by the affidavit of the foreman or publisher of the newspaper, and it was held that the statement in the affidavit that the person making it was the foreman was sufficient evidence of the fact. *Fairbault v. Wilson*, 34 Minn. 254, 25 N. W. 449.

The method of proving the publication of ordinances is controlled largely by the charter provisions of the municipality, and in many instances by statutory provisions. *Schott v. People*, 89 Ill. 195; *Terre Haute & I. Ry. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, 1 Starr & Curtis Anno. Stat., p. 718, and notes to par. 66.

58. *Chamberlain v. Litchfield*, 56 Ill. App. 652.

Proof of publication held to be sufficient. *Albia v. O'Harra*, 64 Iowa 297, 20 N. W. 444; *DeLoge v. N. Y. Central & H. R. Ry. Co.*, 92 Hun (N. Y.) 149, 36 N. Y. S. 697.

Not necessary that the certificate of the recorder show dates of publication. *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577.

59. *Moss v. Oakland*, 88 Ill. 109.

a mistake in the publication of the date of the passage will not affect it, the date of passage not being a part of the ordinance.<sup>60</sup>

### § 866. How ordinances proved.

In many states the method of proving ordinances is prescribed by statute,<sup>61</sup> but the statutory method is not exclusive; the common law method may be employed.<sup>62</sup>

60. *Vincent v. Pacific Grove*, 102 Cal. 405, 36 Pac. 773.

As to time and frequency and method of publication, see §§ 698, 699 *ante*.

61. **How ordinances proved.** Code of Mississippi, 1892, § 3010; *Chrisman v. Jackson*, 84 Miss. 787, 37 So. 1015. Printed copies of the ordinances, resolutions, rules, orders and by-laws of any city or incorporated town of the state of Missouri, purporting to be published by authority of such city or incorporated town, and manuscript or printed copies of such ordinances, resolutions, rules, orders and by-laws certified under the hand of the officer having the same in lawful custody, with the seal of such town or city annexed, shall be received as evidence in all courts and places in Missouri, without further proof; and any printed pamphlet or volume, purporting to be published by authority of any such town or city, and to contain the ordinances, resolutions, rules, orders or by-laws of such town or city, shall be evidence in all courts and places within the state of Missouri, of such ordinances, resolutions, rules, orders or by-laws. R. S. Mo. 1909, § 6295; *Campbell v. St. Louis & Sub. Ry. Co.*, 175 Mo.

161, 75 S. W. 86; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Keating v. Skiles*, 72 Mo. 97.

Where printed volume of ordinances may be put in evidence, by charter, the ordinances stand as statutes so far as relates to the method of proving their contents. *Napman v. People*, 19 Mich. 352, 355.

Ordinances are not admissible in evidence unless certified under seal of the town. Civil Code of Georgia, § 5216; *Central Ga. Ry. Co. v. Bond*, 111 Ga. 13, 36 S. E. 299.

Printed copies of by-laws or ordinances of a corporation published under authority are admissible in evidence. 1 Bates Anno. Ohio Stat., § 1699, and are sufficient proof of the ordinance. *Barter v. Cleveland, etc. R. Co.*, 151 Ill. App. 118; *Hancock v. McCarthy*, 145 Iowa 51, 123 N. W. 766.

In Texas, Spl. Acts, 22 Leg. 1891, p. 58, §§ 164, 172; *Missouri, K. & T. Ry. Co. v. Owens*, 8 Tex. Civ. App. 67, 75 S. W. 579.

62. *Alabama*. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576. *Georgia*. *Metropolitan Street*

Where the state statute provides that, "all ordinances of the city may be proved by the seal of the corporation," a document purporting to be a city ordinance approved by the mayor, attested by the register and under the seal of the city is admissible in evidence.<sup>63</sup>

The book in which ordinances are recorded, properly authenticated and proved is competent to prove the ordinance therein contained.<sup>64</sup> So ordinances may be proved by entries in city records, kept by proper authority.<sup>65</sup> Thus the certificate of the clerk at the bottom of an ordinance that it was adopted by the council "makes out a *prima facie* case of the due adoption of the ordinance."<sup>66</sup>

Where the city fails to provide a book for the record of ordinances, ordinances placed on file by the proper

R. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49.

*Illinois.* Cleveland C. C. & St. Ry. Co. v. Bender, 69 Ill. App. 262.

*Indiana.* Green v. Indianapolis, 25 Ind. 490.

*Nebraska.* Johnson v. Finley, 54 Neb. 733, 74 N. W. 1080.

But in Massachusetts, St. 1889, ch. 387, § 1, it seems a city ordinance is not admissible in evidence unless attested by the clerk of the city. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350.

63. Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

64. *Arkansas.* Heno v. Fayetteville, 90 Ark. 292, 119 S. W. 287.

*Georgia.* Stone v. Tallulah Falls, 131 Ga. 452, 62 S. E. 592, cites McQuillin Mun. Ord., § 390; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 491.

*Illinois.* Wapella v. Davis, 39 Ill. App. 592.

*Iowa.* State v. King, 37 Iowa 462.

*Mississippi.* Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015.

*Missouri.* Campbell v. St. Louis & Sub. Ry. Co., 175 Mo. 161, 75 S. W. 86.

*New Jersey.* Montclair v. Scola, 76 N. J. L. 137, 69 Atl. 451.

*North Dakota.* Grafton v. St. Paul, M. & M. Ry. Co., 16 N. Dak. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1.

*Pennsylvania.* Grier v. Homestead Borough, 6 Pa. Super. Ct. 542.

*Tennessee.* Rutherford v. Swink, 90 Tenn. 152, 16 S. W. 76.

*United States.* Fletcher v. Hickman, 165 Fed. 403, Mills' Ann. St. (Colo., 1891), § 4443; Fletcher v. Hickman, 136 Fed. 568, 69 C. C. A. 350.

65. Billings v. Dunnaway, 54 Mo. App. 1; Clarence v. Patrick, 54 Mo. App. 462; People v. Murray, 57 Mich. 396, 24 N. W. 118.

66. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.



custodian may be used as evidence.<sup>67</sup> And the minutes kept by the council clerk were held, in a New York case, competent evidence to prove the adoption of the ordinance.<sup>68</sup> So ordinances may be proved by a book containing a compilation of them legally adopted, notwithstanding a different method of proof is prescribed in the charter.<sup>69</sup> So the record book of ordinances made by the clerk is competent evidence, although the ordinances were never signed by the presiding officer of the council, as the law required.<sup>70</sup> A printed compilation of the ordinance when properly authenticated as correct is admissible where it is shown the original ordinance was destroyed.<sup>71</sup> And where the record of the ordinance is shown to have been lost or destroyed by fire, extrinsic evidence is competent to prove an ordinance.<sup>72</sup>

Proof of the repeal of the ordinance may be made by the production of the repealing ordinance.<sup>73</sup>

An ordinance is to be proved by evidence addressed to the court and not to the jury.<sup>74</sup> Hence it is error to submit to the jury the question of whether or not a given ordinance is in force, since that is a question of law for the court.<sup>75</sup>

67. *Troy v. Atchison & N. R. Co.*, 11 Kan. 519.

68. *Kennedy v. Newman*, 3 N. Y. Super. Ct. (1 Sandf.) 187.

69. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576.

70. *Toledo Consolidating St. Ry. Co. v. Toledo Elec. St. Ry. Co.*, 6 Ohio Cir. Ct. 362.

71. *Ex parte Canto*, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

72. *Gulf Sea & S. F. R. R. Co. v. Calvert*, 11 Tex. Civ. App. 297, 32 S. W. 246; *Ex parte Canto*, 21 Tex. App. 63, 57 Am. Rep. 609, 17

S. W. 155; *Cavane v. Milan*, 99 Mo. App. 672, 74 S. W. 408.

73. *Illinois Central R. R. Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724, 51 Ill. App. 404.

74. *Roulo v. Valcour*, 58 N. H. 347.

Proof of ordinance in particular cases, in accordance with certain provisions of charters. *Pendergast v. Peru*, 20 Ill. 51; *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443; *Boyer v. Yates City*, 47 Ill. App. 115.

75. *Ghio v. Metropolitan St. Ry. Co.*, 125 Mo. App. 710, 103 S. W. 142.

### § 867. Same—ordinances published by authority.

Under charter provisions reciting that ordinances published by authority of the corporation shall be received in evidence without further proof, a book of ordinances which appears to be so published is admissible in evidence without further proof. A case of *prima facie* publication is thus made out, but, of course, may be rebutted.<sup>76</sup> So a printed copy of an ordinance published by authority of the city is *prima facie* evidence of the legal existence of the ordinance and its contents. The burden is on the defendant to overcome this evidence.<sup>77</sup> If it can be determined from any part of a printed book or pamphlet of ordinances that it purports to be published by proper authority it is admissible in evidence.<sup>78</sup>

But a book containing a series of ordinances, with no declaration in, or upon, or as a part of, it, that it was published by competent authority is not conclusive evi-

76. *Illinois*. Illinois Cent. R. R. Co. v. Warner, 229 Ill. 91, 82 N. E. 246, affirming 132 Ill. App. 301; Lindsay v. Chicago, 115 Ill. 120, 3 N. E. 443; Chicago & Alton R. R. Co. v. Winters, 65 Ill. App. 435; Wapella v. Davis, 39 Ill. App. 592.

*Minnesota*. Holly v. Bennett, 46 Minn. 386, 49 N. W. 189.

*Missouri*. St. Louis v. Foster, 52 Mo. 513.

*Texas*. Texarkana, etc. Ry. Co. v. Frugia, 43 Tex. Civ. App. 48, 95 S. W. 563; Houston v. Stewart, 40 Tex. Civ. App. 499, 90 S. W. 49; Galveston, etc. Ry. Co. v. Washington, 94 Tex. 517, 63 S. W. 534, 538.

**Ordinance published by authority.** Book held admissible, though the ordinances contained no enacting clause, there being nothing in evidence to show that the enacting clause was omitted

from the original draft of them as passed by the city council. St. Louis, S. W. R. Co. v. Garber, 51 Tex. Civ. App. 70, 111 S. W. 227.

But a printed pamphlet not purporting on the title page to be published by authority is not admissible, although it contained a printed certificate at the end with a printed statement that the seal was attached. Illinois, I. & M. Ry. Co. v. Minnihan, 129 Ill. App. 432.

77. Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370, 19 S. W. 1053; State v. King, 37 Iowa 462; Tarkio v. Cook, 120 Maine 1, 25 S. W. 202, 41 Am. St. Rep. 678.

78. Wapella v. Davis, 39 Ill. App. 592; McGregor v. Lovington, 48 Ill. App. 202, 207; Chicago & El. I. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144.

dence of the adoption and publication of any particular ordinance contained therein.<sup>79</sup> An ordinance contained in a printed book which is in charge of the proper custodian and purports to have been published by authority of the city and to contain its ordinances, is admissible in evidence without further proof.<sup>80</sup>

79. *Quint v. Merrill*, 105 Wis. 406, 81 N. W. 664.

**Curing error.** Error in admitting pamphlet of ordinances not purporting to be published by authority, if it be error, was cured by the introduction of the original manuscript, with the record proof of its passage. *Winn. v. Cleveland, C. C. C. & St. L. Ry. Co.*, 239 Ill. 132, 87 N. E. 954, affirming, 143 Ill. App. 71.

80. *Missouri*. *Webb City v. Parker*, 103 Mo. App. 295, 77 S. W. 119; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; *Tipton v. Norman*, 72 Mo. 380; *Sheehan v. Owen*, 82 Mo. 458; *Canton v. Ligon*, 71 Mo. App. 407. *Texas*. *Starks v. State*, 38 Tex. Crim. Rep. 233, 42 S. W. 379.

*Washington*. *Spokane v. Griffith*, 49 Wash. 293, 95 Pac. 84.

**Ordinance in book of ordinances.** Notwithstanding the charter provides a different method of proof. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576.

**Text at end of note book not purporting to be published by authority.** *Louisville, N. A. & C. Ry. Co. v. Patchen*, 167 Ill. 204, 47 N. E. 368.

**Pamphlet held admissible even though it contained other matter than ordinances.** *Chicago v. Bullis*, 138 Ill. App. 297; *Earlville v. Radley*, 141 Ill. App. 359.

Admissible notwithstanding the name of the village had been changed, where proper proof of such change was made. *Illinois Central R. R. Co. v. Whiteaker*, 122 Ill. App. 333; *Hinchcliff v. Robinson*, 118 Ill. App. 450.

Books of ordinances thus purporting to be published by authority are made admissible in evidence by statute, without further proof. *Hurd's 1895*, § 65, ch. 24; *Illinois Cent. R. R. Co. v. Burke*, 112 Ill. App. 415.

The book of ordinances of excise commissioners produced by a witness styling himself "assistant clerk of the board" testifying that the book contained all the ordinances passed by the board is *prima facie* proof of the existence of the ordinances. *Byer v. Harris*, 77 N. J. L. 304, 72 Atl. 136.

But a book purporting to contain the published ordinance of a city, in the absence of any showing that there was an ordinance or law authorizing the publication, or that the book had been adopted by the proper city authorities as a compilation of its book of ordinances, is not rendered admissible in evidence by the parol testimony of a witness that such book was published by authority of the city. *Western & A. R. R. Co. v. Hix*, 104 Ga. 11, 30 S. E. 824.

Authority to reprint and publish a charter is not authority to publish ordinances in a book therewith so as to make it conclusive of the regularity of the ordinances.<sup>81</sup>

**§ 868. Same—when original record required.**

Where a city is required by statute or the provisions of its charter to keep a journal of its proceedings, and of all acts, resolutions and ordinances of the corporation, such journal or record is admissible in evidence to prove the ordinance.<sup>82</sup> And where the book containing the ordinances of the city was produced and the mayor testified that it was the journal of the proceedings of the board of aldermen, including the ordinance adopted, ordinances contained therein were held admissible in evidence by reading from the book.<sup>83</sup> If the charter of a town requires its officers to keep a record of the by-laws, and ordinances, and of the time, manner and place of publication, in a book to be provided for that purpose, which shall be received in all courts as evidence, other proof than such record is unnecessary.<sup>84</sup> Where by statute it is essential to the validity of a village ordinance that the vote upon the passage be taken and recorded, the record of the proceedings of a village board reciting that all the members were present and that the ordinance in question was passed unanimously, is sufficient to show that the ordinance was legally passed.<sup>85</sup>

When the ordinances of the City of St. Louis are collated and published by authority of the city they are admissible in evidence without any seal, or attestation. *St. Louis v. Foster*, 52 Mo. 513; *Rockville v. Merchant*, 60 Mo. App. 365; *Schweitzer v. Liberty*, 82 Mo. 309; *Tipton v. Norman*, 72 Mo. 380.

But a pamphlet purporting to contain an ordinance, which does not purport to be published by authority, is incompetent to prove the ordinance. *Baker v. Maquon*, 9 Ill. App. 155.

81. *Quint v. Merrill*, 105 Wis. 406, 81 N. W. 664.

82. *Stewart v. Clinton*, 79 Mo. 603; *Lebanon Light & Water Co. v. Lebanon*, 163 Mo. 254, 63 S. W. 811.

83. *Jackson v. K. C., Ft. S. & M. Ry. Co.*, 157 Mo. 621, 634, 58 S. W. 32.

84. *St. Charles v. O'Malley*, 18 Ill. 407.

85. *Schofield v. Tampico*, 98 Ill. App. 324; *Gilberts v. Rabe*, 49 Ill. App. 418.

### § 869. Same—proof by copy.

A properly authenticated copy of an ordinance is usually admissible in evidence, where it is attested by the seal of the corporation and the signature of the officers having charge of the original.<sup>86</sup> So it has been held that a sworn copy of an ordinance of an incorporated city of another state is competent evidence.<sup>87</sup>

State statutes and municipal charters usually authorize the admission in evidence of printed copies of by-laws and ordinances when certified under the hand of the officer having the same in lawful custody, with the seal of such municipality annexed.<sup>88</sup>

### § 870. Same—sufficiency of authentication.

Where objection is raised to the introduction of an ordinance in evidence, its authenticity as a part of an ordinance of the city must be shown by proper proof.<sup>89</sup> The production of a newspaper, published in the town, containing what appears as an ordinance of the town, which is headed "Published by Authority," and the ordinance purports to be signed by the president of the board, and countersigned by the town clerk, proves a sufficient adoption and authentication of the ordinance, to render it admissible in evidence, under the charter of the city.<sup>90</sup> The certificate of the city clerk, under his official seal, is *prima facie* evidence of the passage of an

86. *Pugh v. Little Rock*, 35 Ark. 75; *Bayard v. Baker*, 76 Iowa 220, 40 N. W. 818; *Metropolitan Street R. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Green v. Indianapolis*, 25 Ind. 490.

87. *Louisville N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617.

88. R. S. Mo 1909, §§ 6295, 8903, 9083; 1 Bates, Ann. Ohio Stat., § 1699; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

An amended ordinance is admissible in evidence without the original, notwithstanding it would have been more formal to have introduced the original also. *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 89 S. W. 319.

89. *Union Pac. Ry. Co. v. Ruzicka*, 65 Neb. 621, 91 N. W. 543.

90. *Block v. Jacksonville*, 36 Ill. 301.

ordinance, and renders it admissible in evidence.<sup>91</sup> The identification by a policeman of the ordinance book and the signature of the mayor to the ordinance was held sufficient to render it admissible in evidence.<sup>92</sup>

### § 871. Same—proof in actions for penalty.

In most states the manner of pleading ordinances and the method of proof in actions to recover a penalty, is prescribed by statute. In the main the rules of evidence and proof of ordinances in actions for the recovery of a penalty are the same as in a civil action, with this difference, however, municipal courts have jurisdiction of actions to recover a penalty, and since these courts take judicial notice of the ordinances of the municipality, the same care in pleading and proving the ordinance is not required as in a civil action in a state court.<sup>93</sup>

### § 872. Admissibility of parol testimony to prove.

Usually, parol evidence is not admissible to prove an ordinance or resolution. The ordinance itself or a proper authenticated copy,<sup>94</sup> or the council record must be

91. *McChesney v. Chicago*, 159 Ill. 223, 42 N. E. 894; *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443.

92. *Ottumwa v. Schaub*, 52 Iowa 515, 3 N. W. 529.

The proof of authenticity of an ordinance, held sufficient in particular cases. *Terre Haute & I. R. Ry. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, affirming 31 Ill. App. 314; *Knight v. Railroad Co.*, 70 Mo. 231.

**Authentication.** Identification in prosecution for violation. *Webb City v. Parker*, 103 Mo. App. 295, 77 S. W. 119.

Under a charter provision it was necessary to prove that the mayor had signed the ordinance,

and it was held too late to sign on the day of trial. *Mandeville v. Band*, 111 La. 806, 35 So. 915; *Mayor v. Dupuis*, 30 La. Ann. 1105.

Extracts from the minutes of the mayor and council and from the tax digest, held admissible in evidence notwithstanding they were certified by the "clerk of council," his full title being "clerk of council of the City of Marietta." *Anderson v. Blair*, 121 Ga. 120, 48 S. E. 951.

93. See chapter on action to enforce ordinances, *post*.

94. *Pugh v. Little Rock*, 35 Ark. 75, 80.

produced.<sup>95</sup> So parol evidence is not admissible to explain representations and understandings of an ordinance at the time of its passage,<sup>96</sup> nor to prove that an ordinance, valid upon its face, was not legally passed, or was passed and approved prior or subsequent to the date of its attestation;<sup>97</sup> but the record of the proceedings of the city council are admissible for the purpose.<sup>97a</sup>

As a rule, the records of municipal action by a city council cannot be contradicted or supplemented by parol evidence. Where the law requires such records to be kept they are the only lawful evidence of the action to

*Contra.* Troy v. Atchison Ry. Co., 11 Kan. 519.

**Parol evidence.** But in one case parol evidence of resolutions was held competent where it appears that no record of them has been made and the charter did not, in express terms, require them to be recorded. Darlington v. Commonwealth, 41 Pa. St. 68.

Held, competent to prove by the secretary of the town council of M. that a certain book contained the ordinances of said town, whereupon a given ordinance contained therein was admissible in evidence notwithstanding no showing was made that the ordinance was authorized by the act of incorporation. McCaffrey v. Thomas, 4 Penn. (Del.), 56 Atl. 382.

In one case the ordinance had been lost or destroyed, held that its contents might be shown by the attorney who wrote it. Cavanaugh v. Milan, 99 Mo. App. 672, 74 S. W. 408.

95. Stewart v. Clinton, 79 Mo. 603; Lebanon Light & Water Co. v. Lebanon, 163 Mo. 254, 63 S. W. 811.

**Proof of ordinance.** The passage of an ordinance may be proved by parol testimony. The filing of attested copies of ordinances raises a *prima facie* presumption that they were duly and regularly passed, until their validity is impeached. Weatherhead v. Cody, 27 Ky. L. Rep. 631, 85 S. W. 1099.

"The acts of a borough may be proved otherwise than by its records or other written documents." Oakley v. Luzerne Borough, 25 Pa. Super. Ct. 425.

Proceedings of a village board may be shown from the original records or minutes thereof but questioned, whether they could read from an ordinance book. Shaw v. New York Central & H. R. Co., 83 N. Y. S. 91, 85 App. Div. 137.

96. State v. Paris Ry. Co., 55 Tex. 76; Hagerstown v. Startzman, 93 Md. 606, 49 Atl. 838.

97. Ball v. Fagg, 67 Mo. 481.

97a. State ex rel. v. Mead, 71 Mo. 266, in effect overruling on this point Ball v. Flagg, 67 Mo. 481.

which they refer.<sup>98</sup> So extrinsic proof of the consent of the mayor is not admissible.<sup>99</sup> But where an ordinance has been destroyed by fire, parol proof is admissible to show that it had been signed by the mayor.<sup>1</sup> And in one case the testimony of the mayor who presided at the time the ordinance was passed was admitted to prove the passage of the ordinance.<sup>2</sup> So in another, where the records of a city were imperfect, and did not show all the proceedings, parol testimony to show that an ordinance did pass the council was admitted.<sup>3</sup> And in another, parol testimony was admitted to explain irregularities and discrepancies in the record.<sup>4</sup> And in an Illinois case parol evidence was admitted to show that interlining in an ordinance was done before the passage of it.<sup>5</sup>

### § 873. Proof of violation of ordinances as evidence of negligence.

The passage of ordinances by a municipality regulating the speed of trains and the running of street cars within the city limits, is a valid police regulation for the protection of the lives of persons, and the evidence of such an ordinance and proof of its violation in a civil action for damages is negligence *per se* in some jurisdictions.<sup>6</sup> The effect of evidence of the violation of an or-

98. *Stevenson v. Bay City*, 26 Mich. 44.

"When the law requires records of proceedings to be kept by drainage commissioners, they are the only lawful evidence of the action to which they refer." *People v. Carr*, 231 Ill. 502, 83 N. E. 269.

Parol testimony was admitted to explain an ambiguity in an ordinance. *Donovan v. Donovan*, 236 Ill. 636, 86 N. E. 575.

§ 617 *et seq. ante*.

99. *Lexington v. Headley*, 5 Bush. (Ky.) 508.

1. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.

**Parol to prove contents.** Where an ordinance is lost, a party claiming rights thereunder may show contents as it passed council by parol. *Cavanev v. Milan*, 99 Mo. App. 672, 74 S. W. 408. See *Wells v. Pressy*, 105 Mo. 164, 16 S. W. 670.

2. *Heller v. Alvarado*, 1 Tex. Civ. App. 409, 20 S. W. 1003.

3. *Troy v. A. & N. Ry. Co.*, 11 Kan. 519.

4. *Chicago & A. Ry. Co. v. Wilson*, 128 Ill. App. 88.

5. *Ronan v. People*, 193 Ill. 631, 61 N. E. 1042.

6. **Negligence, to violate an ordinance.** *Correll v. B. C. R. &*



dinance regulating the speed of trains has been extensively discussed in a large number of cases in the Supreme Court of Missouri. The final conclusion of that court appears to be that evidence of the violation of an ordinance regulating the speed of trains is negligence *per se* and that it is not necessary for the plaintiff to allege and prove acceptance of the ordinance upon the part of the railroad company.<sup>7</sup>

M. Ry. Co., 38 Iowa 120; Wilson v. Southern Ry. Co., 64 S. C. 162, 36 S. E. 701, 41 S. E. 971.

Obstructing street, held negligence. Overhouser v. American Cereal Co., 118 Iowa 417, 92 N. W. 74.

It is negligence *per se* for a railway company to violate valid ordinances and the court may so instruct the jury, as ordinances regulating the speed of trains. Central of Ga. Ry. Co. v. Bond, 111 Ga. 13, 17, 36 S. E. 299 (doubting W. & A. R. R. v. King, 70 Ga. 261); Atlanta & W. P. R. R. v. Wyly, 65 Ga. 120; Central R. R. v. Thompson, 76 Ga. 770; Tift v. Jones, 77 Ga. 181, 3 S. E. 399; Central R. R. v. Smith, 78 Ga. 694, 697, 3 S. E. 397; Western & A. R. R. Co. v. Young, 81 Ga. 397, 412, 7 S. E. 912; Columbus v. Ogletree, 96 Ga. 177, 179, 22 S. E. 709.

7. Jackson v. K. C. F. S. & M. Ry. Co., 157 Mo. 621, 58 S. W. 32, per Burgess, J., reviewing leading Missouri cases. Upon the latter point the court refused to follow Fath v. Tower Grove Ry. Co., 105 Mo. 537, 16 S. W. 913, and subsequent cases adopting the rule therein contained, which was that in order to recover for negligence in the violation of an ordinance regulating the speed of

trains the plaintiff must prove acceptance of the ordinance by defendant. The Fath case was followed in Sanders v. So. Electric Ry. Co., 147 Mo. 411, 48 S. W. 855.

Compare also Bluedorn v. Mo. Pac. R. R., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; Dahlstorm v. St. Louis, I. M. & S. R. R. Co., 108 Mo. 525, 18 S. W. 919; Grube v. Mo. Pac. R. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep. 645; Bergman v. St. L., I. M. & S. Ry. Co., 88 Mo. 678; Merz v. Mo. Pac. R. R., 14 Mo. App. 459, 88 Mo. 672; Becker v. Schutte, 85 Mo. App. 57; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104; Harmon v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Gratiot v. Mo. Pac. R. R. Co., 116 Mo. 450, 21 S. W. 1094; Murphy v. Lindell Ry. Co., 153 Mo. 252, 54 S. W. 442; Day v. Citizens' Ry. Co., 81 Mo. App. 471; McAndrew v. St. Louis & S. Ry. Co., 88 Mo. App. 97.

An ordinance need not be pleaded which requires railroad companies to keep vigilant watch, etc., or prove its acceptance before it can be read in evidence. Sepeowski v. St. L. Transit Co., 102 Mo. App. 110, 119, 76 S. W. 693.

See Campbell v. St. Louis & Sub. Ry. Co., 175 Mo. 161, 75 S. W. 86.

Ordinances which have for their purpose the protection of persons from injury, may be introduced in evidence in actions for damages resulting from the violation of such ordinance.<sup>7a</sup> Thus an ordinance requiring "any

Ordinance admissible to show negligence without being pleaded. *Brasington v. South Bound R. R. Co.*, 62 S. C. 325, 40 S. E. 665.

*Contra.* *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613, 619. Compare *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500.

7a. *Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554; *Wright v. Malden & M. Ry. Co.*, 4 Allen (Mass.) 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Karle v. K. C., St. Joseph & C. B. Ry. Co.*, 55 Mo. 476; *Burke v. City and County Contract Co.*, 117 N. Y. S. 400, 133 App. Div. 113.

The ordinance must relate to the alleged negligent act under investigation. *Shaffer v. Roesch*, 215 Pa. St. 287, 64 Atl. 511.

**Ordinances as evidence in negligence cases.** An ordinance forbidding fast driving is admissible to show negligence in an action for damages resulting therefrom. *Johnson v. Thomas* (Cal., 1896), 43 Pac. 578.

Fast driving in violation of an ordinance, held negligence *per se*. *Robinson v. Simpson*, 8 Houst. (Del.) 398, 32 Atl. 287.

Whether it is negligence to run at a rate of speed in violation of an ordinance in an action for damages resulting therefrom is sometimes a question for the jury. *Lind v. Beck*, 37 Ill. App. 430; *Simons v. Gaynor*, 89 Ind. 165; *Eaton v. Crips*, 94 Iowa 176, 62 N. W. 687.

In one case an ordinance for-

bidding a driver from leaving his team standing in the street was held not competent evidence in an action for damages against the owner of the team, because of injury sustained by plaintiff in consequence of alleged negligence on the part of the driver in leaving the team so stand in violation of the ordinance. *Dolfinger v. Fishback*, 12 Bush. (75 Ky.) 474.

In case of an action for damages resulting from fast driving in the street the ordinance forbidding such driving is admissible. *Sandifer v. Lynn*, 52 Mo. App. 553.

In one case it was held that such ordinance was admissible in evidence, not as furnishing proof of negligence on the part of defendant but as tending to relieve the plaintiff from the imputation of negligence on his part. *Williams v. O'Keefe*, 9 Bosw. (22 N. Y.) Super. Ct. 536; 24 How. Pr. (N. Y.) 16.

While the ordinance is competent evidence to be submitted to the jury it is not conclusive. *Knuipple v. Knickerbocker Ice Co.*, 84 N. Y. 488.

In one case defendant was going along the sidewalk leading a horse in the roadway and the horse swerved to the sidewalk and kicked plaintiff. An ordinance forbidding any one to lead a horse on a sidewalk was held admissible as bearing on defendant's negligence. *Grinnell v. Taylor*, 85 Hun (N. Y.) 85, 32 N. Y. S. 634.

owner or contractor who shall hereafter build or cause to be built" any building abutting upon a public sidewalk after the completion of the first story to cause a roofed passageway to be built in front of the building upon the sidewalk is admissible in evidence in an action for an injury resulting by reason of the failure to roof such passageway, and is evidence of negligence.<sup>8</sup>

So evidence of the failure to comply with an ordinance regulating the use of elevators,<sup>9</sup> and an ordinance regulating the protection of hatchways was held to be negligence *per se*.<sup>10</sup> So evidence that a street car was stopped in the middle of the crossing of a street in violation of an ordinance is admissible in an action for damages resulting therefrom, and has been held sufficient proof of negligence.<sup>11</sup>

An ordinance designed to enforce the performance of a common law duty, is properly admitted in evidence in an action for damages arising from common law negligence. Thus an ordinance requiring that openings in pavements should be properly guarded is admissible in evidence in an action for damages for injuries resulting from falling into an unguarded opening in the sidewalk.<sup>12</sup> So ordinances prohibiting animals from running at large upon the streets and highways without a keeper are admissible in evidence in actions to recover damages arising from injuries received by allowing animals to be improperly at large in violation of the ordinance.<sup>13</sup>

8. *Smith v. Milwaukee B. & T. Exch.*, 91 Wis. 360, 367, 64 N. W. 1041, 51 Am. St. Rep. 912.

9. *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737.

10. *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194, 69 S. W. 368.

11. *Mueller v. Milwaukee St. Ry. Co.*, 86 Wis. 340, 56 N. W. 914.

12. *Roberson v. Wabash St. L. & Pac. Ry. Co.*, 84 Mo. 119.

13. *Baldwin v. Ensign*, 49 Conn. 113; *Decker v. Gammon*, 44 Me. 2 McQ—60

322; *Barnes v. Chapin*, 4 Allen (Mass.) 444.

Violation of an ordinance forbidding horses to run loose upon the streets which results in injury to a child, held to be negligence. "The ordinance having been declared on, and in evidence, and the plaintiff having shown that appellant's horses were loose upon the streets, the accident, and due care upon her part, that proof made a *prima facie* case of negligence." *Maxwell v. Durkin*, 86 Ill. App. 257, 261, affirmed 185 Ill. 546.

So violating an ordinance forbidding horses to stand in the street unhitched and unguarded where injury results, is evidence of negligence.<sup>14</sup> Such ordinances are designed to protect life and limb. Persons upon the streets have a right to expect that such regulations will be obeyed, and hence will govern themselves accordingly.<sup>15</sup> So ordinances forbidding wagons to stand crosswise of the streets and trucks and other obstructions to be placed on the streets or sidewalks, of course, are intended to render the streets more safe and convenient, and are, therefore, proper police regulations.<sup>16</sup>

It seems that where the duties enjoined by a city ordinance are due to the municipality or to the public at large, and not as composed of individuals, the admission of the ordinance in evidence and proof of its violation is not evidence of negligence and cannot create a civil liability upon the part of the person violating the ordinance. This is well illustrated in cases where the city by ordinance undertakes to place upon the abutting owner of property on a public street the duty of removing the ice and snow therefrom. Evidence of such ordinance and its violation will not make the abutting owner

14. *Jones v. Belt*, 8 Houston (Del.) 562.

Failure, negligence *per se*. *Siemers v. Eisen*, 54 Cal. 418, approving *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. (N. Y.) 458, 464.

15. *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47.

16. *Lane v. Atlantic Works*, 111 Mass. 136; 140.

In an action for damages resulting from the violation of certain ordinances it was held that the ordinance might be considered by the court with other evidence. *Baltimore City Pass. Ry. Co. v. McDonnell*, 43 Md. 534; *Wright v. Makden & M. R. R. Co.*, 4 Allen (Mass.) 283.

One who makes a speech in the street and causes a crowd to collect, held not to be liable for the consequential damages since the act is not a nuisance *per se*. *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664.

Damage received in attempting to cross a skid placed across the sidewalk for the purpose of loading goods will not necessarily give a cause of action, since it cannot be said as a matter of law that such use of the sidewalk was unreasonable. *Jochem v. Robinson*, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298.

liable to persons injured by the neglect to remove the snow and ice as required by the ordinance.<sup>17</sup>

In cases of negligence growing out of injuries resulting from the violation of statutes the violation is generally held to be negligence *per se*.<sup>18</sup>

#### § 874. Proof of violation by plaintiff in actions for civil liability.

In an action for damages for negligence, evidence of the fact that at the time the injury for which damages is sought was received the plaintiff himself was violating an ordinance, will not prevent recovery unless it is shown that such violation upon the part of plaintiff contributed to the injury. "Because a plaintiff is himself negligent or is acting in violation of law, he is not therefore prevented from recovering damages for an injury which has resulted from the negligence of defendant where but for the want of ordinary care on the part of the defendant the misfortune would not have happened." <sup>19</sup>

In a Massachusetts case the ordinance required horses and wagons while loading to be placed lengthwise of the street and as near as possible to the sidewalk. Plaintiff violated the ordinance by placing his horse and wagon transversely to the course of the street. It was held that his failure to comply with the ordinance in this respect

17. Kirby v. Boylston Market Assn., 14 Gray 249; Flynn v. Canton Co., 40 Md. 312, 323.

18. Dodge v. B. C. R. & M. R. R. Co., 34 Iowa 276; Reynolds v. Hindman, 32 Iowa 146; Johnson v. St. P. & D. R. Co., 31 Minn. 283, 17 N. W. 622.

Statute required door openings in buildings to be protected, and failure was held to be *prima facie* evidence of negligence. McRickard v. Flint, 114 N. Y. 222, 227, 21 N. E. 153.

The failure to perform a statutory duty, specifically imposed under the police power for the protection of the public, is negligence *per se*. Platte, etc. C. & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68.

19. Klipper v. Coffey, 44 Md. 117, 127.

Principle is well established, as in cases of trespass on railroad tracks. Baltimore & O. R. R. Co. v. State, 33 Md. 542, 554; Baltimore & O. R. R. Co. v. State, 36 Md. 366.

did not prevent him from maintaining an action against one who injured his horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so. It was "found that, though plaintiff's team was standing there in violation of a city ordinance, yet there was room for defendant's team to pass by, using due care, and the only fault of the plaintiff consisted in the violation of the city ordinance. It was not found that this violation contributed to the injury." <sup>20</sup>

In an early English case it was held that evidence of wrongfully allowing a fettered donkey to be on the highway, where the donkey was injured, did not bar action by the owner for damages.<sup>21</sup> So leaving a horse attached to a vehicle untied and unattended in a street in violation of an ordinance, will not bar recovery for damages by a street car.<sup>22</sup>

20. *Steele v. Burkhardt*, 104 Mass. 59, 61, 6 Am. Rep. 191.

Contributory negligence of defendant. *McMahon v. Pacific Express Co.*, 132 Mo. 641, 34 S. W. 478.

Pedestrians and drivers of carriages in the streets have equal rights. Both must exercise care and prudence. *Brooks v. Schwerin*, 54 N. Y. 343.

Contributory negligence of defendant should be submitted to the jury. *Merritt v. Fitzgibbons*, 29 Hun (N. Y.) 634.

Negligence in placing a team alongside a street which does not contribute to the injury will not bar recovery. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354.

One crossing a street who knows that a team is approaching at an unlawful rate of speed cannot presume that an ordinance

forbidding fast driving will be observed. *Baker v. Pendergast*, 32 Ohio St. 494, 30 Am. Rep. 620.

If the violation of an ordinance does not contribute to the injury of plaintiff this will not bar his action. Rule applied to damages resulting from a collision of plaintiff's carriage with that of defendant in the street. *Hall v. Ripley*, 119 Mass. 135.

A cause of action against one who negligently drives into the horse of plaintiff which is standing on the street with no one in charge thereof in violation of an ordinance, held not to be barred. *Kearns v. Sowden*, 104 Mass. 63, note.

21. *Davies v. Mann*, 10 M. & W. 545.

22. *Albert v. Bleecker Street Ry. Co.*, 2 Daly (N. Y.) 389; *Wamer v. D., L. & W. R. R. Co.*, 80 N. Y. 212.

In a New York case the statute forbade standing on street car platforms. In an action for negligence by one in such position it was held that mere violation of the statute in this respect did not bar the action.<sup>23</sup>

Evidence of the violation of an ordinance by plaintiff in an action for damages is admissible to show contributory negligence on his part.<sup>24</sup> Thus in an early Massachusetts case plaintiff was traveling in violation of the statutes for the observance of the Lord's Day. In an action for damages by reason of a defective highway the violation of the statute was not pleaded as a defense, but it was held that the defendant town could prove the violation of the statute.<sup>25</sup> So in the same state it was held that in an action for damages caused by a collision of two vehicles on a highway, evidence that plaintiff was traveling on the left side of the road in violation of a statute, when the collision occurred, was admissible in evidence to show negligence.<sup>26</sup>

23. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 108, 21 N. E. 101.

24. *Steele v. Burkhardt*, 104 Mass. 59.

25. **Proof of violating a statute without pleading it.** "In such cases, evidence that a party is guilty of a violation of law supports the issue of a want of proper care; nor can it be doubted that in these and similar actions the averment in the declaration of the use of due care, and the denial of it in the answer, properly and distinctly puts in issue the legality of the conduct of the party as contributing to the accident or injury which forms the ground-work of the action. No specific averment of the particular unlawful act which caused or contributed to produce a result could, in such cases, be deemed neces-

sary. \* \* \* It is the disregard of the requirements of the statute by the plaintiff which constituted the fault or want of due care which is fatal to the action." Per Bigelow, C. J., in *Jones v. Andover*, 10 Allen (Mass.) 18, 20, 21, approving *Bosworth v. Swansey*, 10 Met. (Mass.) 363.

26. *Jones v. Andover*, 10 Allen (Mass.) 18.

See *Kearns v. Snowden*, 104 Mass. 63, note.

Violating an ordinance forbidding a high rate of speed which directly contributes to an injury resulting from a collision with the team of another, due to the latter's negligence, held to be a conclusive bar to recovery therefor. *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

Evidence that plaintiff was driving at a rate of speed greater than

that permitted by an ordinance is admissible on the question of his negligence. *Hall v. Ripley*, 119 Mass. 135.

One was injured while on a vehicle standing crosswise of a street in violation of an ordinance by the negligent driving of a wagon against it, held if his act contributed to his injury he could not recover. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 10 N. E. 555, 4 Am. St. Rep. 354.

In one case plaintiff was injured in attempting to escape being run over by defendant's wagon by getting on the sidewalk

with a push cart, held that the ordinance forbidding the use of push carts on the sidewalks was incompetent as a defense to the action. *Dennison v. Miner* (Pa., 1886), 2 Atl. 561.

Goods on a sidewalk were injured by a horse running upon the sidewalk. Held, that an ordinance forbidding the placing of goods on the sidewalk was inadmissible since its violation was not the proximate cause of the damage. Hence, it could not be used to show contributory negligence on the part of the owner of the goods. *Gannon v. Wilson* (Pa., 1886), 5 Atl. 381.



## CHAPTER 24.

## MUNICIPAL CONTROL OF OFFENSES AGAINST STATE.

Sec.	Sec.
875. State laws and municipal ordinances distinguished.	881. Same—Illinois.
876. Municipal and state offenses.	882. Same—Kentucky.
877. Source of municipal power to legislate on offenses against the state.	883. Same—Missouri.
878. The same act may be made an offense against the state and the municipal corporation.	884. Same—North Carolina.
879. Same — California—Connecticut.	885. Same—Rhode Island — Indiana.
880. Same—Georgia.	886. Same—Texas.
	887. Offenses that may be made both state and municipal enumerated.
	888. Can there be two punishments?

## § 875. State laws and municipal ordinances distinguished.

While the state laws are designed to furnish a rule of conduct, operating alike on all persons to whom they are intended to apply throughout the limits of the state, such laws are sometimes local or special in their character and apply only to designated portions of its territory.<sup>1</sup> The limitation in this respect is controlled entirely by the organic law. Ordinances and by-laws, as we have seen, in so far as they concern the limits of the local corporation, may possess the same restrictive characteristics; and by express legislative grant they may be made to operate beyond the corporate boundaries.<sup>2</sup> It is obvious, therefore, that the distinction between such local and state laws is not to be found alone in their

1. **Public law.** It is not necessary that a public act should extend to all parts of the state. It is public in character if it extends equally to all persons within the

territorial limits described by the statute. *Levy v. State*, 6 Ind. 281.

See § 198 *ante*.

2. §§ 259, 657-665.

territorial operation. The source of power to promulgate is one fundamental distinction, as fully explained in appropriate places throughout this work.<sup>3</sup> Another fundamental difference is that state laws are designed to meet demands, exigencies and conditions which concern all of the people of the state, while ordinances are enacted and enforced for the benefit of the inhabitants of the local community. The purpose of the former is to control state affairs and of the latter to deal with municipal matters.<sup>4</sup>

### § 876. Municipal and state offenses.

Not infrequently do we find matters of essential public concern confided to the municipal corporation, as the enforcement of state tax and election laws, local control of state officers, the preservation of the public peace, the administration of justice, etc.<sup>5</sup> On the other hand, we often find state control of local officers, municipal taxation, license and local improvements, the collection and distribution of revenue in the local community for purely municipal purposes, the control of strictly municipal departments, local parks, waterworks, sewers, the construction of municipal buildings, etc.<sup>6</sup> No general rule can be laid down respecting what matters are state and what are municipal that will apply in all jurisdictions. This is usually made to depend not alone upon the fundamental principles of decentralization in our system of government, and home rule for the local community, but, as well, upon the constitution and course of legislation and judicial decision in the particular state. In no state is the line very accurately drawn where municipal power ends and state authority begins.<sup>7</sup> This is especially true respecting offenses.<sup>8</sup>

3. §§ 643, 644.

4. §§ 358, 672-675 *ante*.

5. §§ 322-324 *ante*.

6. §§ 173-183, 219-226 *ante*.

7. §§ 170, 247 *ante*. State ex rel. v. Owsley, 122 Mo. 68, 76, 26 S. W. 659; St. Louis v. Dorr, 145

Mo. 466, 479, 480, 41 S. W. 1094, 68 Am. St. Rep. 575, 42 L. R. A. 686, 46 S. W. 976.

8. The municipality "has ample space to legislate without trenching upon the jurisdiction of the

Most municipal charters authorize the local corporation to levy taxes, prohibit, suppress and license saloons, tippling houses, billiard tables, ten pin alleys, etc., restrain and prohibit houses of prostitution and other disorderly houses and practices, disorderly conduct, breaches of the peace, gaming and gambling houses, desecrations of the Sabbath day, various kinds of public indecencies and many other things treated in part or in whole by general state statutes.<sup>9</sup> Sometimes the jurisdiction of the state and local corporation is concurrent; sometimes the latter has exclusive control, properly granted by the state, of specified offenses; and sometimes local jurisdiction is denied where the particular offense is fully covered by state statute, or where it is in its essence regarded as a public crime as distinguished from an offense peculiarly municipal. Thus public drunkenness, although made a public offense by statute, affects especially the morals of the local community; and hence, ordinances denouncing it have been sustained under a general grant of power<sup>10</sup> by courts that have declined to uphold ordinances originating by the same authority relating in like manner to subjects covered by state laws *e. g.*, sale of intoxicating liquor.<sup>11</sup>

state. In all doubtful cases it would be better for the corporate authorities to arrest and commit the offender for trial before the proper state tribunal." Per Lumpkin, C. J., in *Jenkins v. Thomasville*, 35 Ga. 145, 147.

9. *Rice v. State*, 3 Kan. 141, 164; *Gardner v. People*, 20 Ill. 430, 433.

10. *Bloomfield v. Trimble*, 54 Iowa 399, 6 N. W. 586.

"Municipal government stands between the family and the state. It is an aid to both, and partakes of the nature of both. Police ordinances are at once family rules on a large scale, and state laws on a small scale. \* \* \* Many

transactions that are made penal by the general laws of the state may, at the same time, afford material for a proper police ordinance. The state may deal only with the central elements of a transaction which is fringed all round with adjuncts that ought to be prohibited by ordinance as highly mischievous to the quiet of municipal society." Per Bleckley, J., in *McRea v. Americus*, 59 Ga. 168, 170.

Keeping house of ill-fame characterized as an offense peculiarly municipal. *Greenwood v. State*, 6 Baxter (65 Tenn.) 567.

11. *Foster v. Brown*, 55 Iowa 686, 8 N. W. 654.

The decisions on this subject are numerous and conflicting. Perhaps on no single topic of municipal corporation law have there been so many discordant utterances even by the same courts and the same individual judges. But the best considered cases, especially the more recent ones, have properly extended the sphere of activity of the municipal corporation in dealing with police offenses. The necessity of thus enlarging municipal jurisdiction is obvious to the careful student of the conditions and needs of the crowded modern urban centers of population. The earlier conceptions of our courts on this subject are less definite and satisfactory.<sup>12</sup>

§ 877. Source of municipal power to legislate on offenses against the state.

Under the usual grant of municipal powers, which, in general terms, includes the authority to enact all necessary ordinances to preserve the peace and advance the local government of the community, the local corporation cannot provide by ordinance for the punishment of an act constituting a misdemeanor or crime by state statute. The cases in the note fully illustrate the rule.<sup>13</sup>

12. § 30 *ante*; chapter 25 *post*.

13. Offenses covered by State Statutes; ordinances relating to, void. *Kassell v. Savannah*, 109 Ga. 491, 110 Ga. 289, 35 S. E. 147; *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298; *Keck v. Gainsville*, 98 Ga. 423, 425, 25 S. E. 559; *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329; *Kahn v. Macon*, 95 Ga. 419, 22 S. E. 641; *Reich v. State*, 53 Ga. 73, 75; *Vason v. Augusta*, 38 Ga. 542; *Adams v. Albany*, 29 Ga. 56.

Gambling. *New Orleans v. Miller*, 7 La. Ann. 651.

Prohibiting and exhibiting gambling table. *Ex parte Fagg*, 38 Tex. Crim. App. 573, 44 S. W. 294, 40 L. R. A. 212.

Sale of intoxicating liquor. *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494.

Selling lottery tickets. *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757.

Visiting house of ill-fame. *In re Ah You*, 88 Cal. 99, 25 Pac. 974.

Opium smoking, etc. *In re Sic*, 73 Cal. 142, 148, 14 Pac. 405.

Power to pass ordinances to secure the peace does not authorize an ordinance forbidding the keeping open of stores and shops, on Sunday. *Corvallis v. Carlile*, 10 Ore. 139.

Ordinances relating to selling goods on Sunday held void when subject was covered by state; there

It may only exercise such powers as legitimately belong to the local and internal affairs of the municipality. In the performance of such functions much latitude is often permitted. But it is entirely competent for the legislature to confer in express terms such powers as will enable the local corporation to declare by ordinance

was no express power to pass the ordinance. *Flood v. State*, 19 Tex. Crim. App. 584, overruling *Cradock v. State*, 18 Tex. Crim. App. 567.

Charter power to "close up dram-shops, etc., whenever necessary or expedient," and to "make all needful and proper regulations concerning grog-shops," etc., is not sufficient to regulate by ordinance Sunday closing, when the subject covered by state statute. *Angerhoffer v. State*, 15 Tex. Crim. App. 613.

Regulating the number of hours in which mechanics and laborers shall be employed each day on public work of the city. Ordinance held void as offense was made indictable by statute. *State v. McNally*, 48 La. Ann. 1450, 21 So. 27.

**Assault.** Power to enact ordinances "for the suppression of vice and immorality," held not to authorize an ordinance to punish for assault covered by general law. *Ex parte Smith*, Hemp. 201, Fed. Cas. No. 12,967a.

**Assault and battery.** Under general power to "regulate the police," etc., an ordinance creating the offense of assault and battery—a state offense—and providing for its punishment is unauthorized. The court observed that where "personal rights and liberty are involved," the charter powers are to be strictly con-

strued; that if under simply a general welfare clause, a city can pass ordinances against assaults and batteries, it is difficult to conceive to what extent a city government might not go under such a clause. *People ex rel. v. Brown*, 2 Utah 462. Compare *Mayor v. Allaire*, 14 Ala. 400.

**Assault on public officer.** *State v. Keith*, 94 N. C. 933.

Power "to prevent and restrain disturbances," does not authorize an ordinance permitting punishment for the crime of assault with a dangerous weapon. *Walsh v. Union*, 13 Ore. 589, 11 Pac. 312.

Ordinance as to breach of peace which is an offense against the state is void under general power. *Raleigh v. Dougherty*, 3 Humph. (Tenn.) 11.

An affray being a petty offense, the ordinance forbidding it is valid. *Ex parte Freeland*, 38 Tex. Crim. App. 321, 42 S. W. 295, distinguishing *Leach v. State*, 36 Tex. Crim. App. 248, 36 S. W. 471.

**Injuring public property.** *Washington v. Hammond*, 76 N. C. 33.

**Harboring and enticing seamen.** *Lumpkin, J.*, who gave the opinion, observed that under the general grant of power delegated, "the city authorities may cover all cases not provided for by the paramount authorities of the state.

any given act an offense against its authority, notwithstanding such act has been made by statute a public offense and a crime against the state. And where the regulation of a specific matter has been thus expressly and exclusively given to the local corporation, whether it be intrinsically state or local, the corporation may exercise the power so conferred, unfettered, until such time as it is legitimately withdrawn by the state.

The circumstances under which charter or ordinance

\* \* \* Nay, I might go further, and concede, that where the state law defines an offense generally, and prescribes a punishment without reference to the place where it is committed, in town or county, and the act when committed in the public streets and places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress the special mischief, might probably provide against it by ordinance; because that ingredient or concomitant of the crime might not be supposed to be included in the state law. And this is going quite far enough." *Savannah v. Hussey*, 21 Ga. 80, 86. See dissenting opinion pp. 90-97.

**State affairs.** "I am aware of the necessity of giving extensive powers to these city corporations. There are many regulations of a local nature, in a large populous town, which are not of sufficient importance to the state, to attract the attention of the legislature, but which are, nevertheless, very important to the inhabitants of the town. All these fall within the peculiar province of the city council, but they must not set about regulating the affairs of the state.

It is an usurpation of the powers of the legislature, in which they are not to be indulged." Per Nott, J., in *Schroder v. Charleston*, 3 Brev. (S. C.) 533, 541.

**Public drunkenness.** An ordinance denouncing as an offense to be "drunk and disorderly," held not repealed by a general statute declaring the offense of being drunk or grossly intoxicated." *Ex parte Schmidt*, 24 S. C. 363.

**Adulterated milk.** An ordinance forbidding the sale of "unwholesome, watered or adulterated milk," etc., held not to conflict with a state law declaring in general terms that "no person shall, within this state, manufacture, have, offer for sale or sell any article of food or drugs which is adulterated." *State v. Callac*, 45 La. Ann. 27, 12 So. 119.

**Power to arrest.** An ordinance conferring power upon policemen "to arrest all vagrants, common prostitutes, drunkards and other disorderly persons found in the city," held to be limited to such power conferred by general state law which was confined to the arrest of persons found committing offenses. *People v. Pratt*, 22 Hun (N. Y.) 300,

provisions will supersede state laws on any given subject are fully explained in a former chapter.<sup>14</sup> The enforcement of the fundamental rule that the ordinance must be in harmony, or at least not inconsistent, with the state law, has been the source of much confusion on this subject. The true doctrine appears to be that, whether the city may exercise control of state offenses must be determined by the legislative intent. And such intent must also decide the manner in which the power is to be exercised, and whether such control is to be exclusive or whether it is to be exercised concurrently with that of the state.

**§ 878. The same act may be made an offense against the state and the municipal corporation.**

The general doctrine is supported by the weight of judicial authority that, an act may be made a penal offense under the statutes of the state, and that further penalties may be imposed for its commission or omission by municipal ordinance. But to authorize such ordinance the local corporation must possess sufficient charter power and such power must be exercised in the manner conferred and consistent with the constitution and laws of the state.<sup>15</sup>

14. §§ 840-842 *ante*.

15. Same act, offense against state and municipal corporation —illustrations. "Where a city has concurrent powers with the state it may prescribe a penalty for the violation of its ordinances different from that prescribed by the state for the violation of a statute regarding the same subject-matter. *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516; *St. Louis v. Union Dairy Co.*, 213 Mo. 148, 112 S. W. 525.

An act prohibited by state statute cannot be justified under an

ordinance permitting the same, which ordinance was in force prior to the adoption of the statute. *Mayhew v. Eugene* (Ore., 1909), 104 Pac. 727.

Granting a license under an ordinance to conduct a certain business does not authorize the licensee to carry on such business on Sunday in violation of the state law. *Cain v. Daly*, 74 S. C. 480, 55 S. E. 110.

A municipal corporation may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by

The cases present some discord respecting the nature of the grant of power necessary to sustain such additional regulations. The question of power seems to be the chief source of conflict.

the laws of the state. *New York v. Marco*, 58 N. Y. Misc. Rep. 225, 109 N. Y. S. 58.

When authorized, a municipal corporation may license persons to practice medicine, though a statute requires the same. *Fairfield v. Shallenberger*, 135 Ia. 615, 113 N. W. 459.

Municipal ordinances must harmonize with state laws, and where an offense is covered by the latter, the former must give way. *State v. Dannenberg*, 150 N. C. 799, 63 S. E. 946.

If there is no conflict and the ordinance is reasonable and not discriminatory, both ordinance and statute will stand. *Ex parte Hoffman*, 155 Cal. 114, 99 Pac. 517.

The denunciation by statute of certain uses of the contents of cess-pools, does not prevent municipal corporations adopting cess-pools as a part of their system of sanitation. *Logan v. Childs*, 51 Fla. 233, 41 So. 197.

Where an ordinance providing for the punishment of any one engaged in the bunco business and fixing penalties in excess of those imposed by statute as a punishment for gambling, it was declared void. *Clark v. State*, 46 Tex. Cr. Rep. 566, 81 S. W. 722.

In the absence of express authority a municipal corporation cannot make an act penal by ordinance that is prohibited by statute. *Thrower v. Atlanta*, 124 Ga. 1, 52 S. E. 76, 1 L. R. A. (N. S.)

382, 110 Am. St. Rep. 147. See also, *Louisville, etc. R. Co. v. Com.*, 117 Ky. 350, 25 Ky. L. Rep. 1452, 78 S. W. 124, rehearing denied, 117 Ky. 350, 25 Ky. L. Rep. 2050, 79 S. W. 275.

Both may require owner of automobile to take out a license. *Brazier v. Philadelphia*, 215 Pa. St. 297, 64 Atl. 508.

And both may regulate speed of autos. *Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481.

"Wherever the penalty in a city ordinance is in excess of or less than the penalty prescribed by the state law, the ordinance is invalid." *Ex parte McHenry* (Tex. Cr. App. 1907), 103 S. W. 390.

An ordinance making the doing of an act an offense, is not superseded by a general statute fixing and defining a punishment for the same act. *Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952.

The police power may be exercised concurrently by the state and municipality. *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059; *State v. District Court*, 37 Mont. 202, 95 Pac. 841.

"Whenever the general assembly has by direct enactment, or by its settled public policy derivable from the various statutes passed from time to time, brought within the police power of the state any particular subject, then the municipal authorities of a town or city would seem to have the power, under the usual general wel-



Double regulations have been sustained in Alabama,<sup>16</sup> Arkansas,<sup>17</sup> Colorado,<sup>18</sup> Dakota,<sup>19</sup> Florida,<sup>20</sup> Idaho,<sup>21</sup> Illinois,<sup>22</sup> Indiana (by statute at present the contrary rule prevails),<sup>23</sup> Iowa,<sup>24</sup> Kansas,<sup>25</sup> Kentucky,<sup>26</sup> Louisiana,<sup>27</sup> Massachusetts,<sup>28</sup> Maryland,<sup>29</sup> Michigan,<sup>30</sup> Minne-

fare clause in municipal charters, to deal with such subject by proper ordinance, limited only by the established rule that an act which is declared to be a violation of the criminal laws of the state." *Callaway v. Mims*, 5 Ga. App. 9, 62 S. E. 654.

16. *Alabama*. *Mobile v. Rouse*, 8 Ala. 515; *Mobile v. Allaire*, 14 Ala. 400.

17. *Arkansas*. *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

18. *Colorado*. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Hughes v. People*, 8 Colo. 536, 9 Pac. 50.

19. *Dakota*. *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577.

20. *Florida*. *Theisen v. McDavid*, 34 Fla. 440, 26 L. R. A. 234, 16 So. 321; *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214, 16 So. 398.

21. *Idaho*. *State v. Preston*, 4 Idaho 215, 38 Pac. 694, where authorities are reviewed.

22. *Illinois*. *Hankins v. People*, 106 Ill. 628; *McPherson v. Chebanse*, 114 Ill. 46, 28 N. E. 454; *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199; *Westgate v. Carr*, 43 Ill. 450; *Baldwin v. Murphy*, 82 Ill. 485; *Seibold v. People*, 86 Ill. 33; *Skidmore v. Bricker*, 77 Ill. 164; *Severin v. People*, 37 Ill. 414; *Freeland v. People*, 16 Ill. 380; *Chicago v. Brownell*, 41 Ill. App. 70; *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

23. *Indiana*. *Williams v. Warsaw*, 60 Ind. 457; *Waldo v. Wallace*, 12 Ind. 569, disapproving *Madison v. Hatcher*, 8 Blackf. (Ind.) 341, and *Indianapolis v. Blythe*, 2 Ind. 75.

24. *Iowa*. *Bloomfield v. Trimble*, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212.

25. *Kansas*. In re *Jahn*, 55 Kan. 694, 41 Pac. 956; In re *Thomas*, 53 Kan. 659, 37 Pac. 171; *Kansas City v. Grubel*, 57 Kan. 436, 46 Pac. 714.

26. *Kentucky*. *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; *March v. Commonwealth*, 12 B. Mon. (Ky.) 25.

27. *Louisiana*. *Monroe v. Hardy*, 46 La. Ann. 1232, 15 So. 696; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *State v. Clifford*, 45 La. Ann. 980, 13 So. 281; *State v. Chase*, 33 La. Ann. 287; *Board of Police v. Giron*, 46 La. Ann. 1364, 16 So. 190; *New Orleans v. Collins*, 52 La. Ann. 973, 27 So. 532.

28. *Massachusetts*. *Commonwealth v. Goodnow*, 117 Mass. 114.

29. *Maryland*. *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *Rosberg v. State*, 111 Md. 394, 74 Atl. 581.

30. *Michigan*. *Wayne Co. v. Detroit*, 17 Mich. 390; *Fennell v. Bay City*, 36 Mich. 186; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124.

sota,<sup>31</sup> Mississippi,<sup>32</sup> Missouri,<sup>33</sup> Nebraska,<sup>34</sup> New Jersey,<sup>35</sup> New York,<sup>36</sup> Ohio,<sup>37</sup> Oregon,<sup>38</sup> South Carolina,<sup>39</sup>

31. *Minnesota*. *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *State v. Oleson*, 26 Minn. 507, 5 N. W. 959; *State v. Ludwig*, 21 Minn. 202; *State v. Charles*, 16 Minn. 474; *State v. Bruckhauser*, 26 Minn. 301, 3 N. W. 695.

Ordinances relating to gaming does not abrogate or suspend the common law on the subject in the city. *State v. Crummey*, 17 Minn. 72.

32. *Mississippi*. *Johnson v. State*, 59 Miss. 543; *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420.

33. *Missouri*. *Glasgow v. Bazan*, 96 Mo. App. 412, 70 S. W. 257; *St. Louis v. Vert*, 84 Mo. 204; *State v. Cowan*, 29 Mo. 330; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; *De Soto v. Brown*, 44 Mo. App. 148; *Plattsburg v. Trimble*, 46 Mo. App. 459; *Kansas City v. Hallett*, 59 Mo. App. 160; *St. Joseph v. Vesper*, 59 Mo. App. 459; *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791; *Ex parte Hollwedell*, 74 Mo. 395; *Independence v. Moore*, 32 Mo. 392; *St. Louis v. Cafferata*, 24 Mo. 94; *Linneus v. Dusky*, 19 Mo. App. 20; *Kansas City v. Neal*, 49 Mo. App. 72; *Piper v. Boonville*, 32 Mo. App. 138; *St. Louis v. Lee*, 8 Mo. App. 598; *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Marshall v. Standard*, 24 Mo. App. 192; *Ex parte Kiburg*, 10 Mo. App.

442; *Kansas City v. Zahner*, 73 Mo. App. 396; *Ex parte Caldwell*, 138 Mo. 233, 39 S. W. 761; *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878.

34. *Nebraska*. *Brownville v. Cook*, 4 Neb. 101.

35. *New Jersey*. *State (Riley) v. Trenton*, 51 N. J. L. 498, 5 L. R. A. 352, 18 Atl. 116; *State (Paul) v. Gloucester*, 50 N. J. L. 585, 15 Atl. 272; *State v. Plunkett*, 18 N. J. L. 5.

36. *New York*. *Brooklyn v. Toynbee*, 31 Barb. (N. Y.) 282; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *New York v. Hyatt*, 3 E. D. Smith (N. Y.) 156.

37. *Ohio*. *Wightman v. State*, 10 Ohio 452; *State v. Ulm*, 7 Ohio N. P. 659.

38. *Oregon*. *Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295; *State v. Sly*, 4 Ore. 277; *State v. Bergman*, 6 Ore. 341.

39. *South Carolina*. *State ex rel. v. Williams*, 11 S. C. 288; *State ex rel. v. Columbia*, 6 Rich. Law (S. C.) 404, 406, per O'Neill, J., dissenting from Schroder v. Charleston, 3 Brev. (S. C.) 533, on this point; *Greenville v. Kemmis*, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; *McCormick v. Calhoun*, 30 S. C. 93, 8 S. E. 539; *State v. Sanders*, 68 S. C. 192, 47 S. E. 55; *Anderson v. O'Donnell*, 29 S. C. 355, 368, 369, 7 S. E. 593, 1 L. R. A. 632, 13 Am. St. Rep. 723.

South Dakota,<sup>40</sup> Tennessee,<sup>41</sup> Utah,<sup>42</sup> Washington,<sup>43</sup> Wisconsin,<sup>44</sup> and by the United States Courts.<sup>45</sup>

### § 879. Same—California—Connecticut.

It appears that in California no power exists in the municipal corporation to pass an ordinance punishing precisely the same offense as made punishable by the penal laws of the state.<sup>46</sup> So in Connecticut it appears the rule obtains that matters regulated by general statutes cannot be covered by municipal ordinance.<sup>47</sup>

### § 880. Same—Georgia.

In Georgia where the subject is covered by state statute the municipal corporation cannot deal with it by ordinance, unless expressly authorized,<sup>48</sup> but where the

40. *South Dakota*. Yankton v. Douglass, 8 S. Dak. 440, 66 N. W. 923.

41. *Tennessee*. State ex rel. Karr v. Shelby Co. Taxing Dist., 16 Lea (84 Tenn.) 240; State v. Mason, 3 Lea (71 Tenn.) 649; Greenwood v. State, 6 Baxter (Tenn.) 567, 32 Am. Rep. 539.

42. *Utah*. Ex parte Douglass, 1 Utah 108; Salt Lake City v. Howe (Utah, 1910), 106 Pac. 705.

43. *Washington*. Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324.

44. *Wisconsin*. State v. Newman, 96 Wis. 258, 71 N. W. 438; Platteville v. McKernan, 54 Wis. 487, 11 N. W. 798.

45. *United States*. Moore v. Illinois, 14 How. (U. S.) 13, 14 L. Ed. 306, affirming 5 Ill. 498; United States v. Holly, 3 Cranch C. C. 656; McLaughlin v. Stephens, 2 Cranch C. C. 148; United States v. Wells, 2 Cranch C. C. 45; Cross v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287.

46. Ex parte Solomon, 91 Cal. 2 McQ—1

440, 27 Pac. 757; In re Ah You, 88 Cal. 99, 25 Pac. 974; In re Sic, 73 Cal. 142, 148, 14 Pac. 405.

47. Examine State v. Welch, 36 Conn. 215; State v. Flint, 63 Conn. 248, 28 Atl. 28.

Ordinances enacted under charter power held abrogated by subsequent legislative act covering the same subject. Taking oysters within the borough. South Port v. Ogden, 23 Conn. 128.

An ordinance of Waterbury forbidding the sale of impure milk within the corporate limits, held *ultra vires*, because the subject-matter was regulated by general statute. In such case the municipal charter contained an express prohibition. State v. Tyrrell, 73 Conn. 407, 47 Atl. 686.

48. See Georgia cases in § 877, note 13 *ante*.

Penniston v. Newman, 117 Ga. 700, 45 S. E. 65; Thrower v. Atlanta, 124 Ga. 1, 52 S. E. 76, 1 L. R. A. (N. S.) 332.

But such ordinance when au-

statute does not cover the subject a municipal ordinance is valid.<sup>49</sup> The fact that the offense is against the common law, as street and night walking by females, does not deprive the city of jurisdiction.<sup>50</sup> So where the statute prohibits the keeping of tippling houses or retailing liquor without a license an ordinance may prohibit sales of liquor, since in the opinion of the court, the two offenses are not identical.<sup>51</sup> So municipal corporations in that state may regulate the selling of intoxicating liquor if this subject is not covered by state law.<sup>52</sup> While the city cannot punish as an offense against it anything which by statute is an offense against the state, yet where the statute makes the unlawful sale of liquor an offense but does not make the keeping of liquors for unlawful sale an offense, an ordinance may provide for the punishment of the latter offense. The ordinance "hovers on the margin of the statute, but nowhere overlaps the text. If there is keeping for unlawful sale, the ordinance is violated, whether any sale is made or not. In case a sale ensues, the statute is also violated; but this does not cancel the violation of the ordinance. An offense committed against one jurisdiction cannot be wiped out by committing another against another jurisdiction."<sup>53</sup>

### § 881. Same—Illinois.

General power to enact ordinances does not authorize ordinances covering state offenses. Conferring upon the

thorized by the legislature, is valid. *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390.

49. *Rothschild v. Darien*, 69 Ga. 503.

50. *Braddy v. Milledgeville*, 74 Ga. 516, 519.

51. *Hill v. Dalton*, 72 Ga. 314.

52. *Paulk v. Sycamore*, 104 Ga. 728, 31 S. E. 200; *Brown v. Social Circle*, 105 Ga. 834, 32 S. E. 141; *Cunningham v. Griffin*, 107 Ga. 690, 33 S. E. 664. Compare *Hood*

*v. Von Glahn*, 88 Ga. 405, 14 S. E. 564.

53. *Menken v. Atlanta*, 78 Ga. 668, 672, 2 S. E. 559; *Mayson v. Atlanta*, 77 Ga. 662, 666.

A municipal ordinance prescribing a penalty for loafing on the streets, held not void as an effort to punish for the same acts as are embraced in the state laws against vagrancy. *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845.

local corporation power to act concerning the sale of liquor, for example, does not repeal the general law of the state on the same subject.<sup>54</sup> Unless the city has exclusive power on the subject, as for example, the power to regulate gaming and gambling houses, the general state law prevails. A mere general grant of power on the subject does not repeal the state law relating thereto. The jurisdiction may be concurrent and mere failure of the city to act under the power granted does not prevent the state from exercising jurisdiction.<sup>55</sup> In Illinois where the power is expressly conferred the municipal ordinance may cover a state offense, and double punishment may be inflicted for the unlawful act.

§ 882. Same—Kentucky.

Under the Kentucky Constitution, "No municipal ordinance shall fix a penalty for violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."<sup>56</sup>

§ 883. Same—Missouri.

The Missouri statute provides that "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, *unless otherwise prescribed or authorized by some special provision of its charter*, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."<sup>57</sup>

54. Gardner v. People, 20 Ill. 430.

55. Berry v. People, 36 Ill. 423; Fant v. People, 45 Ill. 259.

56. Taylor v. Owensboro, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948.

57. Statute construed to hold that an ordinance concerning breach of the peace did not conflict with the state statute on the same subject. Glasgow v. Bazan, 96 Mo. App. 412, 415, 70 S. W. 257.

### § 884. Same—North Carolina.

Ordinances making acts punishable that are already made penal and punishable under the general law of the state are not favored in North Carolina.<sup>58</sup> The power to pass ordinances is held to be in subordination to the public laws regulating the same matter for the entire state.<sup>59</sup> "It may be that the legislature has power to authorize a town to make an offense against the state a separate offense against the town, but this could be done only by an express grant of power."<sup>60</sup>

### § 885. Same—Rhode Island—Indiana.

In Rhode Island by statute "no ordinance or regulation whatsoever, made by a town council, shall impose, or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor, or offense, by the statute law of the state."<sup>61</sup>

In like manner the Indiana statute provides that, "whenever any act is made a public offense against the state by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance, of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only."<sup>62</sup>

58. Assault on public officer. *State v. Keith*, 94 N. C. 933.

Injuring public property. *Washington v. Hammond*, 76 N. C. 33.

59. Selling liquor on Sunday. *State v. Langston*, 88 N. C. 692.

60. *State v. Brittain*, 89 N. C. 574.

61. *Baxter*, Petitioner, 12 R. I. 13; *State v. McCulla*, 16 R. I. 196, 14 Atl. 81; *State v. Pollard*, 6 R. I. 290.

62. *Whiting v. Doob*, 152 Ind. 157, 52 N. E. 759; *Indianapolis v. Higgins*, 141 Ind. 1, 40 N. E. 671; *Zeller v. Crawfordsville*, 90 Ind. 262; *Clevenger v. Rushville*, 90 Ind. 258.

Act held constitutional. *Jett v. Richmond*, 78 Ind. 316.

Statute applied in case of interference with policeman. *Indianapolis v. Huegele*, 115 Ind. 531, 18 N. E. 172.

## § 886. Same—Texas.

It has been held in Texas that it is not competent for the municipal council to create by ordinance and make it an offense against the city, that which is by general law already an offense against the state punishable by fine and imprisonment, as the offense of keeping and exhibiting a gaming table.<sup>63</sup> But it has also been held in that state that state laws and municipal ordinances may concurrently operate upon the same subject, if not inconsistent, such as the offense of assault.<sup>64</sup> So it has been held that an affray being a petty offense may be made a municipal offense by ordinance although it is by statute an offense against the state.<sup>65</sup> In that state the legislature cannot confer upon a municipal court jurisdiction concurrent with the state courts over violation of state laws within the state.<sup>66</sup>

Statute does not apply to an ordinance making it an offense to sell intoxicating liquors within the city limits without first obtaining a city license. The case proceeds upon the theory that such act was not an offense against the state law. *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802.

63. "Under the authorities, we are inclined to the view that, in the face of the constitutional provision \* \* \* where an offense has been made such by state law, notwithstanding it is a petty offense, it must be prosecuted by authority of the state, and against its peace and dignity." But it was unnecessary to decide the question in that case, since the offense, under the law of Texas, was exclusively within the jurisdiction of the state court. *Ex parte Fagg*, 38 Tex. Crim. App. 573, 589, 44 S. W. 294, 40 L. R. A. 212.

64. *Hamilton v. State*, 3 Tex.

Crim. App. 643; *Ex parte Wilson*, 14 Tex. Crim. App. 592.

65. *Ex parte Freeland*, 38 Tex. Crim. App. 321, 42 S. W. 295, distinguishing *Leach v. State*, 36 Tex. Crim. App. 248, 36 S. W. 471.

The Texas Penal Code defines a petty offense as one which a justice of the peace or the mayor or other officer of a city or town may try and punish. Penal Code, Tex., 1895, art. 57.

Ordinance relating to selling goods on Sunday passed without express power, held void where it conflicted with the state statute on the same subject. *Flood v. State*, 19 Tex. Crim. App. 584, overruling *Craddock v. State*, 18 Tex. Crim. App. 567.

66. *Leach v. State*, 36 Tex. Crim. App. 248, 36 S. W. 471; *Ex parte Wickson*, Tex. Crim. App. (1898), 47 S. W. 643; *Ex parte Ellis*, Tex. Cr. App. (1898), 47 S. W. 1117.

Where a state law regulates the

§ 887. Offenses that may be made both state and municipal enumerated.

Under ample charter power, ordinances carrying appropriate penalties forbidding acts also made penal by state statutes relating to the following subjects, have been sustained: bawdy houses and houses of ill fame;<sup>67</sup> lewd women on streets;<sup>68</sup> public drunkenness;<sup>69</sup> liquor selling;<sup>70</sup> liquor selling on

opening and closing of saloons on Sunday, an ordinance enacted by virtue of a charter provision authorizing the regulation of the opening and closing on Sunday, held valid. Such ordinance does not abrogate such law on the same subject. *Fay v. State* (Tex. Crim. App. 1903), 71 S. W. 603.

The Texas constitution provided that "No power of suspending laws in the state shall be exercised except by the legislature." Hence an ordinance forbidding the keeping of disorderly houses which covers the same act prohibited by the penal code and provides the same punishment is invalid for want of authority in the legislature to confer on the city council power to create such an ordinance. *Coombs v. State*, 38 Tex. Crim. Rep. 648, 44 S. W. 854, 47 S. W. 163.

67. *Louisiana*. *Amite City v. Holly*, 50 La. Ann. 627, 23 So. 746.

*Michigan*. *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

*Minnesota*. *State v. Lee*, 29 Minn. 445, 13 N. W. 913.

*Missouri*. *State v. Wister*, 62 Mo. 592; *State v. DeBar*, 53 Mo. 395; *State v. Clarke*, 54 Mo. 17; *State v. Thornton*, 37 Mo. 360

*Oregon*. *Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295.

*South Carolina*. *State v. Sanders*, 68 S. C. 192, 47 S. E. 55.

*Wisconsin*. *Ogden v. Madison*, 111 Wis. 413, 55 L. R. A. 506, 87 N. W. 568.

68. *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656.

69. *Bloomfield v. Trimble*, 54 Iowa 399, 6 N. W. 586.

70. As to concurrent control and regulation of the liquor business, see following cases:

*California*. *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86.

*Colorado*. *Mueller v. People*, 24 Colo. 251, 48 Pac. 965.

*Connecticut*. *State v. Welch*, 36 Conn. 215.

*Florida*. *Thomas v. Saunders*, 56 Fla. 100.

*Georgia*. *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390; *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815.

*Idaho*. *State v. Calloway*, 11 Idaho 719, 84 Pac. 27, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285.

*Illinois*. *Strauss v. Galesburg*, 203 Ill. 234, 67 N. E. 836.

*Iowa*. *Iowa City v. McInnerny*, 114 Iowa 586, 87 N. W. 498.

*Kentucky*. *Mullins v. Lancaster*,



Sunday;<sup>71</sup> keeping open saloons on Sunday;<sup>72</sup> Sunday regulations;<sup>73</sup> gaming and gambling;<sup>74</sup> keeping gambling house;<sup>75</sup> billiard tables;<sup>76</sup> sale of lottery tickets;<sup>77</sup> nuisances;<sup>78</sup> disturbing the peace;<sup>79</sup> assault;<sup>80</sup>

23 Ky. L. Rep. 436, 63 S. W. 475.

*Michigan.* People v. Furman,

85 Mich. 110, 48 N. W. 169.

*Missouri.* State v. Harper, 58 Mo. 530.

*New Jersey.* Howe v. Plainfield, 37 N. J. L. 145.

*New York.* Blatchley v. Moser, 15 Wend. (N. Y.) 215, per Savage, C. J.; People v. Stevens, 13 Wend. (N. Y.) 341.

*Ohio.* Wightman v. State, 10 Ohio 452.

*Oregon.* Mayhew v. Eugene (Ore., 1909), 104 Pac. 727.

*South Carolina.* State ex rel. Heise v. Columbia, 6 Rich. (S. C.) 404.

71. Elk Point v. Vaughn, 1 Dak. 113, 46 N. W. 577; State (Riley) v. Trenton, 51 N. J. L. 498, 5 L. R. A. 352, 18 Atl. 116; State (Paul) v. Gloucester County, 50 N. J. L. 585, 15 Atl. 272.

72. Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; Seibold v. People, 86 Ill. 33.

73. State v. Ludwig, 21 Minn. 202; St. Louis v. Cafferata, 24 Mo. 94; St. Louis v. De Lassus, 205 Mo. 578, 104 S. W. 12.

Sales on Sunday. McPherson v. Chebanse, 114 Ill. 46, 28 N. E. 454.

74. State v. Crummey, 17 Minn. 72. But see State v. Godfrey, 54 W. Va. 54, 46 S. E. 185.

Gaming. Greenville v. Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R.

A. 725; State ex rel. v. Newman, 96 Wis. 269, 71 N. W. 438; McLaughlin v. Stephens, 2 Cranch C. C. 148, Fed. Cas. No. 8874; Blodgett v. McVey, 131 Iowa 552, 108 N. W. 239.

Playing "craps." Monroe v. Hardy, 46 La. Ann. 1232, 15 So. 696.

75. Greenwood v. State, 6 Baxt. (65 Tenn.) 567, 32 Am. Rep. 539; Robbins v. People, 95 Ill. 175; Ex parte Douglass, 1 Utah 108.

Keeping gaming table. McLaughlin v. Stephens, 2 Cranch C. C. 148; United States v. Holly, 3 Cranch C. C. 656.

76. Plattsburg v. Trimble, 46 Mo. App. 459, 461.

77. Ex parte Kiburg, 10 Mo. App. 442.

78. People v. Detroit White Lead Works, 82 Mich. 41, 46 N. W. 735, 9 L. R. A. 722.

79. St. Charles v. Meyer, 58 Mo. 86; Glasgow v. Bazan, 96 Mo. App. 412, 70 S. W. 257; Lebanon v. Gordon, 99 Mo. App. 277, 73 S. W. 222.

80. Hamilton v. State, 3 Tex. Crim. App. 643; Neola v. Reichart, 131 Iowa 492, 109 N. W. 5.

The fact that a state statute enumerates certain acts which are thereby declared to constitute disorderly conduct will not forbid the legislature from authorizing a municipal corporation to declare other acts than those defined by

assault and battery;<sup>81</sup> carrying concealed weapons;<sup>82</sup> cruelty to animals;<sup>83</sup> animals running at large;<sup>84</sup> abstructing highways;<sup>85</sup> regulating bay windows;<sup>86</sup> fast and careless driving;<sup>87</sup> vagrancy;<sup>88</sup> attempting to rescue prisoner from custody of officer;<sup>89</sup> aiding, counseling and advising prisoner to make escape;<sup>90</sup> regulating porters at stations;<sup>91</sup> selling impure and unwholesome milk;<sup>92</sup> unlawful trespass on property.<sup>93</sup>

### § 888. Can there be two punishments?

A few cases have declared the rule that, when an ordinance and state law prescribe a penalty for the same act, a conviction or acquittal under one is a complete bar to a prosecution under the other.<sup>94</sup> But the decided

statute to constitute disorderly conduct. *In re Stegenga*, 133 Mich. 55, 94 N. W. 385, 61 L. R. A. 763, 10 Det. Leg. n. 68.

81. *State v. Ledford*, 3 Mo. 102; *Avoca v. Heller*, 129 Iowa 227, 105 N. W. 444.

82. *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; *Opelousas v. Giron*, 46 La. Ann. (Pt. 2), 1364, 16 So. 190.

*Contra.* *State v. Rosenthal*, 75 Vt. 295, 55 Atl. 610.

83. *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791.

84. *Westgate v. Carr*, 43 Ill. 450.

85. *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199.

86. *Commonwealth v. Goodnow*, 117 Mass. 114.

87. *State v. Cowan*, 29 Mo. 330.

88. *St. Louis v. Bentz*, 11 Mo. 61; *Kansas City v. Neal*, 49 Mo. App. 72, 78.

89. *Independence v. Moore*, 32 Mo. 392.

90. *De Soto v. Brown*, 44 Mo. App. 148, 152.

91. *Chillicothe v. Brown*, 38 Mo. App. 609.

92. *Polinsky v. People*, 11 Hun (N. Y.) 390.

93. *Brownsville v. Cook*, 4 Neb. 101.

All crimes less than felony at common law may be given to corporation courts. *Ex parte Slattery*, 3 Ark. 484.

All acts made misdemeanors by the state law. *Smothers v. Jackson*, 92 Mich. 327, 45 So. 982.

Ordinance may forbid loafing on street notwithstanding state laws punish same act under vagrancy. *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845.

94. Rule suggested in *State v. Welch*, 36 Conn. 215, 217.

Bar by state constitution. *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948.

weight of judicial authority sustains the contrary doctrine. The same act may constitute several crimes or misdemeanors and the trial and punishment of one will be no bar to a prosecution of another, growing out of the same act.<sup>95</sup> Thus it is no bar to a prosecution for riot that one of the accused had been convicted of assault and battery, arising out of the same transaction or offense.<sup>96</sup> So an assault committed in the presence of the court may be punished in two ways—first, for contempt of court, and second, as a criminal prosecution for the assault.<sup>97</sup>

The doctrine generally supported may be thus stated: That the single act being made punishable both by the state law and by the municipal ordinance of the place wherein it was committed constitutes two distinct and several offenses; an offense against the state and an offense against the municipality. The purpose of the ordinance is to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation: the state law has a more enlarged object in view, namely, the maintenance of the peace and dignity of the state. The offenses, although growing out of the same act, are distinguishable and wholly dis-

State v. Cowan, 29 Mo. 330; State v. Thornton, 37 Mo. 360. These cases overruled by later Missouri cases. See § 500.

Conviction under the ordinance bars prosecution under the statute for the same act. *Ex parte Freeland*, 38 Tex. Crim. App. 321, 42 S. W. 295.

*Contra.* Hamilton v. State, 3 Tex. Crim. App. 643.

**Question undetermined** whether one convicted before a justice of the peace for an assault and battery could be tried and punished by the mayor under an ordinance. Burns v. La Grange, 17 Tex. 415.

"It is not necessary in this case

to decide whether both can punish for the same act; but we have no doubt but that the one which shall first obtain jurisdiction of the person accused may punish to the extent of its power." Rice v. State, 3 Kan. 141, 164.

State v. Plunkett, 18 N. J. L. 5, question raised but not determined whether there could be two punishments.

95. Freeland v. People, 16 Ill. 380; Gardner v. People, 20 Ill. 430, 434.

96. Freeland v. People, 16 Ill. 380.

97. (*Arguendo*). Wragg v. Penn Township, 94 Ill. 11.

connected, and the prosecution at the suit of each proceeds upon a different hypothesis. This rule finds support in Alabama,<sup>98</sup> Arkansas,<sup>99</sup> Colorado,<sup>1</sup> Georgia,<sup>2</sup> Illinois,<sup>3</sup> Indiana,<sup>4</sup> Louisiana,<sup>5</sup> Maryland,<sup>6</sup> Missouri,<sup>7</sup> Minnesota,<sup>8</sup> New York,<sup>9</sup> North Carolina,<sup>10</sup> Oregon,<sup>11</sup> Tennessee,<sup>12</sup> Texas,<sup>13</sup> and in the United States Courts.<sup>14</sup>

98. *Per Collier, C. J., in Mayor, etc. v. Allaire*, 14 Ala. 400, 403.

99. *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214.

1. *Hughes v. People*, 8 Colo. 536, 9 Pac. 50.

2. An acquittal in a state court for assault and battery was held in Georgia to be no defense to an action under an ordinance in the city court for disorderly conduct in fighting, notwithstanding the facts were the same in both trials. *McRea v. Americus*, 59 Ga. 168, 27 Am. Rep. 390.

3. *Hankins v. People*, 106 Ill. 628, 638; *Robbins v. People*, 95 Ill. 175.

*Contra.* *Berry v. People*, 36 Ill. 423; *Bennett v. People*, 30 Ill. 389, 394. But these cases are overruled.

4. Offenses are different—one is an action of debt; the other a fine for violation of a criminal law. *Indianapolis v. Fairchild*, 1 Ind. 315; *Levy v. State*, 6 Ind. 281; *Ambrose v. State*, 6 Ind. 351; *Waldo v. Wallace*, 12 Ind. 569.

But at present by statute an ordinance cannot cover the same act covered by state law, § *ante*.

5. *Monroe v. Hardy*, 46 La. Ann. 1232, 15 So. 696.

6. *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656.

7. *State v. Muir*, 164 Mo. 610, 65 S. W. 285, affirming s. c., 86 Mo. App. 642, disapproving *State v. Simonds*, 3 Mo. 414, and following *Kansas City v. Clark*, 68 Mo. 588; *St. Louis v. Knox*, 74 Mo. 79; *Ex parte Hollwedell*, 74 Mo. 395; *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. 761; *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Lebanon v. Gordon*, 99 Mo. App. 277, 281, 73 S. W. 222.

8. *State v. Lee*, 29 Minn. 445, 13 N. W. 913; *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *State v. Robitshek*, 60 Minn. 123, 61 N. W. 1023.

9. *Blatchley v. Moser*, 15 Wend. (N. Y.) 215, per *Savage, C. J.*; *People v. Stephens*, 13 Wend. (N. Y.) 341.

10. *State v. Stevens*, 114 N. C. 873, 19 S. E. 861.

11. *State v. Sly*, 4 Ore. 277; *Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295; *Mayhew v. Eugene* (Ore., 1909), 104 Pac. 727.

12. *State ex rel. v. Shelby County Taxing District*, 16 Lea (84 Tenn.) 240; *State v. Mason*, 3 Lea (71 Tenn.) 649; *Greenwood v. State*, 6 Baxter (65 Tenn.) 567, 32 Am. Rep. 539.

13. *Texas*. A conviction under the one is no bar to a prosecution

under the other. *Hamilton v. State*, 3 Tex. Crim. App. 643.

*Contra.* *Ex parte Freeland*, 38 Tex. Crim. App. 321, 42 S. W. 295.

Where the conviction is void under the municipal ordinance it is no bar to a prosecution under the state law. *Leach v. State*, 36 Tex. Crim. App. 248, 36 S. W. 471.

See § 886 *ante*.

14. *United States.* Act punishable under federal law may also

be punishable under state law. *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. Ed. 213; *Moore v. Illinois*, 14 How. (U. S.) 13, 14 L. Ed. 306, affirming 5 Ill. 498; *Cooley's Const. Lim.* (6th Ed.), 329; *Biggars, Mun. Manual of Canada*, pp. 629, 630; *Bishop, Crim. Law*, § 897a; *Bishop, Statutory Crimes*, §§ 23, 25.























